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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 239.

WILLIAM WALSH, APPELLANT,

vs.

J. D. MAYER, C. F. MAYER, AND HENRIETTA POLYDORE, AS J. D. MAYER & COMPANY, THE UNION NATIONAL BANK OF NEW ORLEANS, ET AL.

FILED APRIL 26, 1881.

No. 507.

J. D. MAYER, C. F. MAYER, AND HENRIETTA POLYDORE, AS J. D. MAYER & COMPANY ET AL., APPELLANTS,

vs.

WILLIAM WALSH.

FILED MARCH 21, 1882.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

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1 THE UNITED STATES OF AMERICA,
Southern District of Mississippi.

Pleas and proceedings had and done at a regular term of the circuit court of the United States for the southern district of Mississippi, begun and held pursuant to law, at the court-room of said court, in the city of Jackson, in said district, on the first Monday of November, A. D. 1880.

Present and presiding, Honorable R. A. Hill, United States district judge, for Mississippi.

WILLIAM WALSH
vs.
JOHN D. MAYER, CHARLES F. MAYER, HENRIETTA POLYDORE and RODERICK SEAL. } No. 297.

Be it remembered that heretofore, to wit, on the 29th day of December, A. D. 1879, the following bill of complaint was filed in the office of the clerk of said court, to wit:

2 To the honorable the judge of the circuit court of the United States for the southern district of Mississippi, sitting in equity.

William Walsh, who is a citizen of the State of Louisiana, resident in New Orleans, brings this his bill of complaint against John D. Mayer, Chas. F. Mayer, and Henrietta Polydore, and Roderick Seal, citizens of the State of Mississippi, resident in the said southern district, defendants, and thereupon state as follows, to wit:

On the 2d day of January, A. D. 1866, at New Orleans, Louisiana, the said defendants made their certain promissory note in writing of that date, and thereby two years after date promise to pay to the order of themselves seven thousand five hundred dollars and no cents, for value received, with interest at the rate of six per cent. per annum, from date until maturity, and ten per cent. from maturity until final payment, and endorsed and delivered the same to William Barnes, who, on or about the 30th day of June, 1874, sold and delivered the said note to your orator for a valuable consideration, of which the defendants were duly notified.

3 In order to secure payment of the said note, as well as another for the same amount and date, due one year after date, the said defendants, John D. Mayer, Chas. F. Mayer, and Henrietta Polydore, executed their certain indenture of mortgage on the 20th day of February, A. D. 1866, whereby they bargained, sold, and conveyed to the defendant, Roderick Seal, the following described property, situate in Harrison county, Mississippi, to wit: 1st. A certain tract of land with the buildings and improvements thereon, known as Barnes' Hotel, commencing at a stake on the shore of the Gulf of Mexico, which stake stands due south of the southwest corner of the hotel building, and running thence east 414 feet, more or less, along said gulf, then to a street or road called

Texas street, due north of the hotel wharf, and running thence north to the township line between township seven and eight, range eleven west, then due west with the said township line 414 feet, more or less, to a stake, thence south to the sea shore or place of beginning, bounded south by the Gulf of Mexico, north by
4 the township line, west by the property of Mrs. Martha A. Davis, east by Texas street; and, second, a tract of land adjoining the above, and known as the lot upon which is situate the billiard rooms of Barnes' Hotel, and described as follows, viz.: commencing at a stake on the shore of the Gulf of Mexico on the east side of the road or street called Texas street and running thence along the said gulf shore east 334 feet, more or less, to the southwest corner of George Wiggs' property, thence north with the line of said Wiggs' lot about one eighth of a mile to the southeast corner of S. Collins' property, thence west with the line of said Collins' lot 334 feet, more or less, to the street or road called Texas street, thence south with said street to the place of beginning, bounded south by the gulf, north by S. Collins' property, west by Texas street and east by the property of Geo. Wiggs, in all in section one, township eight, south of range eleven west; and all the household furniture and fixtures, &c., if any therein, or which might thereafter be in the s'd hotel.

The said deed recited that it was made, as indeed it was to
5 secure the said note held by your orator, and another note for the same amount of same date and due at one year, and was upon this condition: If the said promissory note shall become due and payable at the respective maturity and shall not be paid, then the said seal shall, upon the request in writing of the holder or holders of said note or either of them, proceed to sell said property, or so much thereof as shall be sufficient to satisfy said note or notes, with all legal interest and charges thereon, after advertising the same in some newspaper in the county, if there be one, and at five of the most public places in the said county of Harrison, one of which shall be at the court house door, for the space of thirty days, at public auction, to the highest bidder for cash, and shall, on payment of the purchase-money, convey said premises so sold to the purchasers, and after paying said notes with all legal interest and charges thereon, and the expenses of such sale, shall pay all the residue, if there shall be any, to the said parties of the first part, meaning the said defendants or their heirs.

6 And if all of said property shall not be sold, to reconvey the remainder to the said John D. Mayer, Chas. F. Mayer, and Henrietta Polydore, who were to remain in possession until the said notes became due and payable, and receive the rents, issues, and profits thereof until possession was demanded, &c., &c. The said deed of trust was duly signed, sealed, acknowledged, delivered, and recorded in the said county of Harrison. It and the said note held by your orator are hereinto filed, marked Exhibit A and B, and are prayed to be taken and held as part of this bill.

The first note secured by said deed, paid prior to the sale of the second note to your orator, and the interest on your orator's note up to the first day of September, A. D. 1874, all of the principal of your orator's said note, and the interest accrued after September 1, 1874, is now due and payable.

The said William Barnes built said hotel, and at one time owned the property sold to the said John D. Mayer, Chas. F. Mayer, and Henrietta Polydore, and sold it them for the sum of $15,000,
7 taking their note secured by the said trust deed. It was intended by him as an investment, and it was understood and agreed by and between them that if the said purchasers were unable to meet said note, they were, on payment of interest, to secure indulgence so long as desired by them. After the maturity of the note held by your orator, and a delay of payment of interest and part of the first note, the said Barnes complained that he was suffering disadvantage in not getting his interest according to the understanding he had in the matter, and told his said vendees that they must pay up their interest, or take up the note, or he would have to foreclose. The said vendees and defendants thereupon endeavored to get a new loan, or some friend to take up the said note and hold them to suit their convenience. In this they failed, and then informed said Barnes if he would hold the notes, and not foreclose the said trust deed, they would raise the money for the
8 interest promptly in the manner suggested by him, but to which they had before objected; that is to say, by giving him their notes, to be discounted in the streets of New Orleans, in an amount sufficient, when discounted, to raise the interest upon said notes as it matured and the balance due upon the first note. Part of said proposition was, that said Barnes should pay for his said vendees the premium for insurance upon said property, which was also to be reimbursed in the manner above indicated; and it was proposed that if this was done by them the said Barnes should, in consideration thereof, extend the time of payment of the note now held by your orator for one year, and thereafter should continue said extension and indulgence annually so long as the said vendees should continue to pay the interest upon the said note of your orator and the premium paid by said Barnes for insurance upon the said property, and the said note was not to be due and payable except on default of payment as stated.

This agreement and understanding was made, and the
9 proposition of said vendees accepted, on or about the 2d day of January, A. D. 1868, when the balance of the first note was paid and all interest upon the note filed with this bill. Upon the same agreement and understanding, and in the mode above indicated, the interest was paid upon said note up to October 8th, 1869, and payment upon the principal extended to October 8th, 1871, when the interest upon the said note was paid, and the note extended to 8th October, 1872. The said vendees did not then pay interest upon the said note, and it was extended for them to Sep-

tember 1, 1873, when the interest was paid in full, and payment of the principal thereof was extended to September 1, 1874. On the said last-named day the interest was paid, and payment of the principal of the said note, with accruing interest, was, by the agreement of the parties, extended to September 1, 1875. The said vendees were engaged in business as partners, keeping the "Barnes Hotel," under the style of J. D. Mayer & Co., and the said Barnes did not need the principal of his debt, and, at the instance and request of his vendees, made the agreement for indulgence and extension, and not to foreclose, to enable said J. D. Mayer & Co. to work the place out of debt. He delayed foreclosure at the request of his said vendees and upon the agreement stated above, and but for said agreement and request would have foreclosed said trust deed and sold the property mortgaged.

Prior to the making of said agreement said Barnes had determined to foreclose his said trust deed, and, after the making thereof, did not attempt to do so because he nad no conscionable right. The said agreement involved the making of small notes by said J. D. Mayer & Co.; all of which distinctly recognized the existence [and] validity of your orator's note, which was discounted by the said Barnes, and in order to raise the interest due upon your orator's note, then in the hands of said Barnes, the said J. D. Mayers & Co. were compelled to suffer a larger rate per cent. discount, so that they, in fact, paid an ample consideration for the indulgence extended, and the agreement was binding and effectual, in equity, at least. In accordance with said agreement the said Barnes extended the time of maturity of the said note, now the property of your orator, and insured said property annually, and the premiums were raised te reimburse him by said J. D. Mayer & Co. Two of the small notes given by said Mayer & Co. to pay said premiums and interest up to Sept'r 1, 1874, one for $693.75, due August 1–4, and one for $693.75, due Sept'r 1–4, purchased by your orator and paid by the J. D. Mayer & Co. These small notes distinctly state, as your orator is informed and believes, the contract upon which they were given, and the extension of payment of the said note of your orator.

When he purchased said note for $7,500, about June 3, 1874, he was informed of the said agreement by said Barnes, and that he would have to continue and carry out the same, which he agreed to do as part of his contract of purchase, as the said J. D. Mayer & Co. well knew. Accordingly, on the said 3d June he wrote to the s'd J. D. Mayer & Co. advising them of his purchase, and calling attention to the insurance upon said property, and his letter was received by them. On the 8th December, 1874, they wrote to your orator, saying they were ready to pay three months' interest ———, upon the said note of your orator for $7,500, but had been served with a garnishment process and could not do so. A copy of said process is hereunto filed as Exhibit C, and prayed to be taken as part of this bill. They did not answer said garnish-

ment until Oct. 24, 1876, and were not discharged therefrom until some time in the year 1878. Upon said notice your orators desisted from any further calls, as the said Mayers & Co. well knew.

In fact the said notice was intended to stop all proceedings for interest upon said note and payment of the principal, and did have that effect. The payment of the principal of your orator's debt was all to be extended upon payment of the interest thereon by agreement of parties, and payment of interest could not be exacted in view of said garnishment process. The said defendants were aware of these facts, and all along knew that your orator reposed upon, and trusted to it, when he purchased s'd note.

Shortly after service of said garnishment process, as your orator has very recently learned, the defendants, J. D. Mayer, Fred-
13 erick Mayer, and Henrietta Polydore, made answer that said process had been personally served on them November 23d, 1874; admitted the execution and delivery of the note now held by your orator claimed that they had paid upon said note, in the way of excess of interest and compound interest, such an amount that the balance due by them on said note amounted to about $2,509.76; states that whatever was due upon said note was owing to William Barnes, as Barnes called upon them after service of garnishment in (said) case and claimed the interest upon said note referred to; "said that said promissory note was bound by the statute of limitation, and for that reason they do not owe the s'd William Barnes or the holder of said note anything, and claim the benefit of the statute of limitation of six years as fully as though specially pleaded. Said answer was signed by all of said parties, and sworn to by them, and a copy thereof is hereunto filed, marked Exhibit C, and prayed to be taken as part of this bill.

Said garnishment process was issued at the suit of the said
14 Union National Bank of New Orleans, and said J. D. Mayer, Frederic Mayer, and Henrietta Polydore were garnished as debtors of said William Barnes, who was defendant in the case. Your orator was not made a party to said suit, though said Mayers and said Polydore knew the said note had been assigned to him by said Barnes long prior to the issuance and service of said garnishment on them, and that he was at and before that time the holder and owner thereof. They took no steps to advise your orator fully of the nature of said proceedings, or to call him into said suit to interplead with plaintiff in reference to said note, and, in fact, no steps were taken in said cause whereby to charge your orator by the determination and judgment involved therein.

The plaintiff, however, was proceeding or about to proceed to contest with said garnishees in reference to their liability upon said notes, or threatened so to do, and the case progressed until June 24, 1878, or about that time, when the plaintiff confessing that said J. D. Mayer, Frederic Mayer, and Henrietta Poly-
15 dore only owed on said note the sum of money stated in the said answer, they therefore agreed and promised to pay the

same to them, under and by virtue of the said attachment proceedings, executed their note therefor, and made the mortgage upon the said Barnes hotel property, hereinafter referred to, and marked Exhibit G.

Of all these things your orator has been very recently informed. He knew nothing before of the said answer of said garnishees, or of the suit, or of the settlement and adjustment reached.

He knew nothing of the facts beyond what is stated in the letters hereinafter filed, and the said J. D. Mayer, Frederick Mayer & Henrietta Polydore, by the execution and delivery of the said note and mortgage, distinctly and deliberately admitted the validity of your orator's said debt. They could not have been and were not personally indebted to said bank in any amounts.

In order to a fair understanding of the whole matter, your orator now details in *totidem verbis* the correspondence between him and s'd J. D. Mayer & Co.

16 On the 30th day of June, 1874, your orator wrote to the defendant by their firm name of J. D. Mayer & Co., as follows:

J. D. MAYER & Co., MISSISSIPPI CITY.

I deem it proper to advise you that I have become the owner of a note given by the partners of your firm January 2d, 1866, for seven thousand five hundred dollars due in two years from date, and secured by deed of trust for principal and interest on the Barnes Hotel property at Mississippi City. I am also the owner of two notes given by you for five premiums on the above property, and for interest on the above note of $7,500 for the current year, and one note due August 14, 1874, for 693\frac{75}{100}$, and one note due S'pt'r 1-4, 1874, for 693\frac{75}{100}$.

The fire insurance policies have been transferred to me by the Factors and Traders' Insurance Company of New Orleans for $4,500, and the New Orleans Mutual Insurance Company of New Orleans for $6,000. Please acknowledge the receipt of this letter.

Yours, &c., WM. WALSH.

16½ NEW ORLEANS, *June 30th*, '74.

This letter was deposited in the post office at New Orleans on the 1st day of July, 1874, postage prepaid and properly addressed.

On the 6th day of July, 1874, your orator receeived a letter in reply from said firm, signed J. D. Mayer in the following words:

"BARNES HOTEL, *July 6th*, '74.

"Mr. WALSH.

"DEAR SIR: Your letter received in reference to your now *being the holder of my notes*, would have answered it before, but have been busy.

"Yours, J. D. MAYER."

On the 30th November, 1874, your orator wrote to the said defendants by their said firm name of J. D. Mayer & Co., as follows:

"NEW ORLEANS, *Nov. 30th*, 1874.

"Mess. J. D. MAYER & Co.

Will any of the members of your firm be in the city soon? I wish to see some of you in relation to your note of $7,500, of
17 which I am the owner. If you are not coming to the city I wish to hear from you in relation to it.

"The interest is paid to first of September last, but I need money, and I wish to know what you propose to do. The fire policy in the New Orleans Mutual Insurance Company expires Feb'y 8th, 1875, and that in the Factors and Traders' Insurance Company expires March 25th, 1875. These must be provided for. Please let me hear from you without delay.

"Yours, &c., WM. WALSH."

On the eighth December, 1874, he received from the said J. D. Mayer & Co. a reply to the said letter, as follows:

"BARNES HOTEL, *Dec. 8th*, '74.

"Mr. WM. WALSH,

DEAR SIR: Yours of late date at hand. We are quite ready to pay 3 months' interest, and would rather pay it that way than to let it run on until the amount gets so large, but we were served with the enclosed writ some few days ago with instructions, if we
18 paid anything now it was at our own risk until the case was decided. We of course do not want to run the risk of paying twice. The insurance I want to have changed, as we have made more chimneys within the last 3 years, and will have to get it described in policy. The time for paying the insurance comes at a bad time. I think we shall not reinsure until about June.

"Yours respectfully,

"J. D. MAYER & CO."

On the 28th January, 1875, your orator wrote to the said defendants by their said firm name, as follows:

"NEW ORLEANS, *Jan.* 28, 1875.

"J. D. MAYER & Co.,

"*Miss. City:*

"I have been trying to make arrangements about insurance in the hotel for the coming year. The old company, the N. O. Mutual, is not willing to reinsure. I can get the same amount, $6,000, at the Sun Mutual Company at 3½ per. cent., a rather high rate, but we must have some protection. In case of fire the insurance money would pay your debt, and you would own the property,
19 and could rebuild. I will advance the premium money and wait till next summer, when your business comes on, and then, I think, we can arrange with the insurance companies so as

to have the premiums payable at times to suit you. As this transaction is with a new office they want a description of the building, which you promised to send me, but which has not come yet. Send me the sketch without delay, as the N. O. Mutual policy expires the 8th of Feb'y.

"Yours, &c., WM. WALSH."

On the 9th Feb'y, 1875, your orator received from said firm a reply to the said letter, signed J. D. Mayer & Co., and in the words and figures following:

"BARNES HOTEL, *Feb'y 9th*, '75.

"Mr. WILLIAM WALSH.

"DEAR SIR: Yours of the 8th is at hand. I should have wrote you before, but my brother has been very low, and it took me all my time to attend to him, but I think now he is safe. I sent you the sketch of buildings, but should like to get it insured 20 for 18 months, so as to change the time for payments coming due in winter.

"Yours, J. D. MAYER."

On the 10th July, your orator enclosed to the said J. D. Mayer & Co., on account of the amount expended for insurance upon the said Barnes Hotel, according to the understanding of the parties, amounting to the sum of three hundred and three and $\frac{75}{100}$ dollars, and on the 10th October, 1875, a like account amounting to the sum of three hundred and eleven and $\frac{14}{100}$ dollars, both of which are herewith filed as exhibits D & E, and are prayed to be taken as a part of the bill.

No replies were received to the letters enclosing said accounts; and on the 18th October, 1875, your orator wrote a letter to the defendant, Henrietta Polydore, which was duly forwarded by mail, in these words and figures:

"NEW ORLEANS, *Oct. 18th*, 1875.

"MRS. HENRIETTA POLYDORE, MISS. CITY:

"I have sent a statement of the amount due me for insurance premiums paid by me on the hotel to your brother John 21 and have written to him twice about it, and have not even received an answer to my letters. Now as I consider you the principal person in the hotel firm, I wish to say to you that this kind of treatment will not do for me. I paid the money to protect your property as well as my own debt, and I want it paid—he promised to pay me the past summer. Please let me know what you can do for me.

Yours, respectfully,

WM. WALSH."

On the first day of November, 1875, your orator received from the said Henrietta Polydore a reply to the said last mentioned letter in these words and figures:

"BARNES HOTEL, *Nov. 1st*, 1875.

To MR. WM. WALSH.

DEAR SIR: I received your letter and immediately wrote to Champlin to know if that ought to be paid as he told me before and also wrote to me as well as to John and Fred not to pay any money of whatever am't to any one until a final adjustment of the matter, so I thought it better to know for myself exactly what ought to be done.

22 Mr. C. replies he has no control over that matter, it is not what the bank claims, etc. I would send you the amount now if I had it, but I did not know any thing of the matter, and have made no provision for it, but just as soon as I possibly can get the money I will send it to you. John is very neglectful of answering letters when he has not the money to send in them, but if money was plenty I think he would answer at once; he hates to owe just as much as I do, but we have had a very bad time here for money all summer.

You may depend on getting yours as soon as we can possibly get it to send. We are doing a pretty good trade shipping oysters, but that has only just now started, not much come in in payment yet, but you may rest assured your claim shall be remembered and attended to shortly.

Yours, v'y respectfully,
HENRIETTA POLYDORE.

On the 2d March, 1876, your orator wrote another letter to the defendants by their said firm name of J. D. Mayers & Co., in the words and figures:

23 "NEW ORLEANS, *March 2d*, 1876.

"J. D. MAYERS & CO., *Miss. City.*

I have already called your attention to the expiration of the fire policy of the Sun Mutual Insurance Co., for $6,000, on your hotel, and will now say that I cannot agree with you in the wish you expressed when I saw you lately at Miss. City, to leave the whole property without any insurance until next summer. I think it would not be wise for you, or safe for me, to leave things in that way. The amount you owe me on the $7,500 is too large to be left in such an unprotected condition, and I cannot consent to it. When the policy in the Fireman's office is out I shall insist on a renewal, and, if necessary, I will advance the premium as before.

Yours respectfully, WM. WALSH."

On the 9th March, 1876, your orator received from the said firm a reply to the said last named letter, in these words and figures:

"BARNES HOTEL, *March 9th*, 1876.

"Mr. WM. WALSH.

24 DEAR SIR: Yours at hand. We do not want to insure any until about July; then we expect to insure for about 15

thousand dollars. I think you will run no risk in that time; as the property would be worth the amount due you if the building was to burn down.

Yours respectfully, J. D. MAYER & CO."

Your orator again wrote to the said defendants, by the said firm name, insisting upon the taking of insurance to protect his large debt in case of accident by fire, and received from them in reply, a letter in these words and figures:

"BARNES HOTEL, *March 27th*, '76."

"Mr. WM. WALSH.

DEAR SIR: Yours at hand. The ball-room is 21 ft. from east wing, and 23 ft. from west wing, and 20 ft. from corner of office; but I am not willing to pay such a rate for insurance, as there is not one bit of danger of it burning. The fire place in the ball room is scarcely ever used; it could only burn in case of the fire starting in some other point.

Yours, J. D. MAYER & CO."

25 The original of the said letter from the said vendees, are in your orator's possession, as well as copies of the letters to them written by him, and if the same are denied or disputed, or demanded, will be produced and proven in this cause. The said letters were written by consent and with knowledge of all of said vendees. The amount expended by your orator for insurance upon the said property, with interest up to December 1, 1879, at six per cent., amounts to the sum of four hundred and eighty-six and $\frac{62}{100}$ dollars, all of which is due by the said J. D. Mayers & Co. An account of said payment is herewith filed, marked Exhibit F, and the same is asked to be taken as part of this bill. The policies of insurance for which said payments of premiums were made, will be filed herewith if required by the defendants. On the 24th June, 1878, the said vendees executed and delivered to the Union National Bank of New Orleans, and corporation of the State of Louisiana, a mortgage upon the said property conveyed by them to the s'd Seal, as aforesaid, a copies of which is herewith filed as Exhibit G, and to Schmidt & Zeigler, and their mortgage herewith filed
26 as Exhibit H, and prayed to be taken as part of the bill; but your orator cannot make the said bank, and the said Schmidt & Zeigler parties defendant to this bill, because to do so, would oust the jurisdiction of this honorable court, they being citizens of the State of Louisiana. The said bank and said Schmidt & Zeigler, will be notified of the pendency of this suit, and that they may come in, confess the jurisdiction, and have such relief as in equity it is entitled to, should it elect so to do.

Ever since the purchase from the said Barnes, the said vendees have carried on the said Barnes Hotel as partners, under the style of J. D. Mayer & Co., in which business they are still engaged.

The said Henrietta Polydore has contributed to the said business, and to the purchase of said property, a much larger amount than the said John D. and Charles F. Mayer, who are her brothers, as your orator is informed, believes and states, and upon the adjustment of accounts between the partners, the said John D. and Charles T. Mayer, will be indebted to her to the extent of some twelve or fifteen thousand dollars. The partnership upon a
27 fair statement will be indebted to her in a much larger amount.

Upon the said letters and the facts in the case as above stated, your orator is advised, believes and charges:

First. The agreement between the parties in reference to the extension of payment of said note for $7,500, purchased by your orator from said Barnes in June, 1874, being supported by a valuable consideration, is binding and operated to postpone the running of the statute of limitation up to the last payment of interest, September, 1875 and 1875, and that the statute did not begin to run until September, 1874 or 1875; that the service of garnishment upon the said John D. Mayer & Co. operated to suspend still further the running of said statute of limitation; and that if not so, the said John D. Mayer, Charles F. Mayer and Henrietta Polydore, are estopped, and will be estopped, in this court to plead the said statute of limitations in bar of your orator's right to a foreclosure of said trust deed, the delay being brought about by their own procurement, and for their benefit, as well as by their consent and agreements.

28 Second. That the said several letters constitute and are a distinct acknowledgment of your orator's said debt, and a written promise to pay the said note for $7,500, filed with this bill, and takes the same out of the operation of the statute of limitations.

Third. That if the said letters are not binding upon all of said vendees, and only upon those who wrote them, your orator is entitled to a foreclosure of his said trust deed pro tanto, and an account between the partners so as to ascertain if there be a balance due the party promising to pay the said note for $7,500, and the extent thereof, and to a decree for said balance against said property in his favor upon the equitable principle of subrogation, &c.

It was not until late in the year 1877, or early in 1878, that your orator was informed of the determination of the said vendees to contest his right to recover because of lapse of time, and he had hoped to effect a settlement without the cost of a protracted litigation. On approaching them recently, however, they deny all liability, and force your orator to sue.

29 The agreement to extend the payment of said note upon payment of interest hereinbefore mentioned was made in the city of New Orleans, in the year 1868, between the said John D. Mayer and the said William Barnes, and has been adopted and acted upon by him and the said Charles F. Mayer and Henrietta

Polydore up to the time when they determined to rely upon the statute of limitation. By their consent and agreement they induced said Barnes and your orator to delay proceedings to foreclose said trust deed, and but for the same your orator's said debt would long since have been collected by due course of law. In fact the said vendees paid interest upon the said note long after it would have been barred by the statute of limitation but for said agreement of extension, and in 1876 distinctly promised to pay the said note of your orator, as well as before and since.

The premises considered, your orator prays that the said John D. Mayer, Charles F. Mayer, Henrietta Polydore, and Roderic Seal be made parties defendant hereto and compelled to answer;
30 that the said John D. and Charles F. Mayer and Henrietta Polydore be required to file with their answers all letters received by them, or either of them, touching the note filed with this bill or the extension of the payment thereof from the said William Barnes or your orator, and copies of all letters written by them, or either of them, to said Barnes or your orator; that they specially answer and state when and where the agreement of extension aforesaid was made, and upon what consideration and condition; that an account be taken of the amount due your orator upon his said note and for insurance premiums paid by him; that the two small notes purchased by your orator from the said Barnes for $693.75 each, and paid by said Mayers and Polydore, be produced and filed by them; that at the hearing they be decreed to pay to your orator the amount ascertained to be due at some short day, and enjoined from pleading the statute of limitation against payment thereof.
If your honor should not deem the letters a new promise
31 to pay; that a new trustee be appointed in the place of said Seal; that said trust deed be adjudged a subsisting security for the said amount so decreed and enforced for payment thereof; or if mistaken in the relief sought, then for such other further and general relief and decree as to equity belongs and your orator's case requires.

NUGENT & McWILLIE, *Pq.*

[Exhibit "A" filed with said original bill is in the words and figures following, to wit:]

32 $7,500.00. NEW ORLEANS, *January 2d*, 1866.

Two years after date we promise to pay to the order of ourselves seven thousand five hundred dollars and no cents for value received, with interest at the rate of six per cent per annum from date, until maturity, and ten per cent from maturity until final payment.

J. D. MAYER.
C. F. MAYER.
HENRIETTA POLYDORE.

[Said note is endorsed as follows, to wit:]

N. O., *January 2d*, 1868.

Interest on the within note paid in full to date.

WM. BARNES.

NEW ORLEANS, *Oct. 8th*, 1869.

Interest on the within note paid in full to date.

WM. BARNES.

NEW ORLEANS, *Oct. 8th*, 1871.

33 Interest on the within note is paid in full to date, 1871.

WM. BARNES.

Interest on the within note paid to 1st September, 1873.

WM. BARNES.

NEW ORLEANS, *1st Sept.*, 1874.

Interest on the within note paid in full to date.

WM. BARNES.

[Said note is also endorsed as follows:]

J. D. MAYER.
C. F. MAYER.
HENRIETTA POLYDORE.

[Exhibit B to said original bill is in the words and figures following, to wit:]

[Three five-dollar inter. rev. stamps.]

34 This indenture made and entered into this twentieth day of February, in the year of our Lord one thousand eight hundred and sixty-six, between John D. Mayer, Charles F. Mayer, and Henrietta Polydore, all residents of the State of Arkansas, of the first part, William Barnes, of the city of New Orleans, State of Louisiana, of the second part, and Roderick Seal, of the county of Harrison, and State of Mississippi, of the third part, witnesseth, That whereas the said party of the second part has this day loaned to the said parties of the first part the sum of fifteen thousand dollars, for the term of one and two years, and for which the said parties of the first part have made their two certain promissory notes for the sum of $7,500 each, both dated January 2d, 1866, drawn to their own order, and by them endorsed and payable as above set forth, with interest at the rate of six per
35 cent. per annum from date until maturity, and if not then paid ten per cent. per annum from maturity until final payment, which were delivered to said William Barnes, who acknowledges the receipt of the same; and the said parties of the first part being willing and desirous to secure the certain and prompt payment of said promissory notes, do for and in consideration of the premises, and for the further consideration of one dollar to them

in hand paid by the said party of the third part, at and before the sealing and delivery of these presents, grant, bargain, sell, and convey unto the said party of the third part, and to his heirs and assigns forever the following described property, &c., to wit:

1. A certain tract of land, together with the buildings and improvements thereon, situate, lying, and being in Mississippi City, county of Harrison, State of Mississippi, known as Barnes Hotel, com-
36 mencing at a stake on the shore of the Gulf of Mexico, which stake stands due south of the southwest corner of the hotel building, and running thence east 414 feet, more or less, along said gulf shore, to a street or road called Texas street, due north of the hotel wharf, and running thence north to the township line, between township 7 and 8, range 11 west, thence due west with said township line 414 feet, more or less, to a stake, thence south to the sea shore, or place of beginning, bounded south by the Gulf of Mexico, north by the township line, west by the property of Mrs. Martha A. Davis, east by Texas street.

2d. A tract of land adjoining the above and known as the lot upon which is situated the billiard room, &c., of Barnes Hotel, and described as follows, viz: commencing at a stake on the shore of the Gulf of Mexico on the east side of the road or street called Texas street, and running thence along said Gulf shore east 334 feet, more or less, to the southwest corner of George Wiggs'
37 property, thence north with the line of said Wiggs' lot about one-eighth of a mile, to the southeast corner of S. Callen's property, thence west with the line of said Callen's lot 334 feet, more or less, to the street or road called Texas street, thence south with said street to the place of beginning, bounded south by the Gulf, north by S. Callen's property, west by Texas street, and east by the property of Geo. Wiggs, all in section one, township 8 south, of range 11 west, all the household furniture, fixtures, &c. of every kind now in or which may hereafter be in the said hotel.

To have and to hold the property aforesaid unto the said party of the third part and his heirs and assigns forever, in trust, and upon the conditions hereinafter stated. That if the said promissory notes shall become due and payable at their respective maturities and shall not be paid, then the said party of the third part shall upon the request in writing of the holder or holders of said notes
38 or either of them, proceed to sell said property or so much thereof as shall be sufficient to satisfy said note or notes, with all legal interest and charges thereon, after advertising the same in some newspaper printed in the county, if there shall be one, and at five of the most public places in said county of Harrison, one of which shall be at the court-house door, for the space of thirty days, at public vendee to the highest bidder for cash, and shall on payment of the purchase money convey said premises so sold to the purchaser, and after paying said notes with all legal interest and charges thereon, and the expenses of such sale, shall pay over the residue, if there shall be any, to the said parties of the first part or

to their heirs or assigns, and if all of said property shall not be sold to re-convey the remainder to the said parties of the first part or to their heirs or assigns, and upon the further condition that the said parties of the first part shall remain in possession of the said
39 premises until the said promissory notes shall become due and payable, and receive the rents, issues, and profits thereof until possession shall be demanded, when the said parties of the first part covenant to and with the said party of the third part, to yield up to him or his legal vendee, peaceable possession of the same.

In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals, on the day, month, and year first above written.

J. D. MAYER. [SEAL.]
C. F. MAYER. [SEAL.]
HENRIETTA POLYDORE. [SEAL.]
R. SEAL. [SEAL.]

THE STATE OF MISSISSIPPI, *Harrison County:*

Personally came and appeared before me, L. L. Davis, clerk of the probate court of said county and State, the within-named John D. Mayer, Charles F. Mayer, and Henrietta Polydore, and R. Seal, and acknowledged that they each signed, sealed, and deliv-
40 ered the foregoing instrument of writing as their own proper and voluntary act and deed on the day and year therein mentioned and for the purposes therein expressed.

Given under my hand and the seal of said court this, the 8th day of May, A. D. 1866.

[SEAL.] L. L. DAVIS, *Clerk.*

THE STATE OF MISSISSIPPI, *Harrison County:*

I, L. L. Davis, clerk of the probate court of said county, do do hereby certify that the annexed instrument of writing and the certificate of the acknowledgment thereof, was filed in my office for record on the 15th day of June, A. D. 1866, and, together with the certificate of record, duly recorded in the said office on the day of the date hereof, in Record of Deeds Book No. 10, pages 4, 5, and 6.

Witness my hand and seal of said court, at Mississippi City, this 15th day of June, A. D. 1866.

L. L. DAVIS, *Clerk.*

41 [Exhibit "C" to said original bill is the words and figures following, to wit:

42 EXHIBIT "C."

THE STATE OF MISSISSIPPI, *Harrison County.*

To the Sheriff of said county, Greeting:

Whereas, William A. Champlin, agent of the Union National Bank, of New Orleans, a corporation domiciliated in the city of

New Orleans, in the State of Louisiana, hath this day complained on oath by affidavit, before me, Thomas Bond, a justice of the peace in and for said county, that William Barnes is justly indebted to the said Union National Bank in the sum of four thousand four hundred and fifty-six dollars and eighty-five cents ($4,456.85), or thereabouts, due by a judgment obtained by said bank in the 5[th] district court for the parish of Orleans, in the State of Louisiana, on the 22d day of June, A. D. 1874, against said Barnes and others *in solido*, and oath having also been made before me that said William Barnes is a non-resident of the State of Mississippi, and re-
43 sides in the city of New Orleans, in the State of Louisiana, and that his post-office is in that city, and bond with security having been given to me pursuant to the statute; you are therefore hereby commanded to forthwith attach the estate, real and personal of the aforesaid William Barnes in your county, to the full value of said demand and the probable costs of this proceedings, and that you safely keep the property so attached as levied upon in your hands unless replevied according to law, so as to compel the aforesaid William Barnes to appear before the circuit court of Harrison county, in the State of Mississippi, to be held at the court-house thereof in Mississippi City, on the third Monday of April next, A. D. 1875, to answer unto the complaint of the aforesaid Union National Bank, and that you summon the said defend-
ant, William Barnes, if to be found in your county, to be
44 and personally appear at the court aforesaid, on the first day of the term above named, then and there to answer accordingly.

And the said plaintiff in attachment having suggested to me that John D. Mayer, Frederick Mayer, and Henrietta Polydore, doing business under the name, firm, and style of John D. Mayer & Co., are indebted to said William Barnes, or have property of his in their hands, or know of some other person or persons who are so indebted to him or who have effects or property of said Barnes in their hands. You are therefore commanded to summon the said John D. Mayer, Frederick Mayer, and Henrietta Polydore, to appear on the return day of this attachment and answer in writing as garnishee of the defendant in this attachment, and serve each of them with a copy of this writ.

Witness my hand and seal this 23d day of November, A.
45 D. 1874.

THOS. BOND, *J. P.* [SEAL.]

I certify the above to be a true copy of the original writ.

A. J. RAMSAY, *Sh'ff.*

[Exhibit D to the original bill is in the words and figures following, to wit:

46 EXHIBIT "D."

J. D. MAYER & CO. TO WM. WALSH.

1875.

Oct. 2.	To amount of bill ren'd for insurance premiums and interest to July 10th	$303 83
	Interest to Oct. 10th	7 31
		$311 14

J. D. MAYER & CO.:

Enclosed I send you statement of the amount due me for insurance premiums paid for you. As I shall have no occasion to go to Miss. City this fall, I wish you to send me this money sometime this month, and as soon as possible, as I need it. Write and let me know when I may expect to receive it.

WM. WALSH.

[Exhibit E to the original bill is in the words and figures following, to wit:]

47 EXHIBIT "E."

J. D. MAYER & CO. TO WM. WALSH.

1875.

Feb'y 15.	To cash paid for insurance in Sun Mutual Co.	$210 00
March 27.	Paid Fireman's Ins. Co.	135 00
		$345 00
	Less 15 per cent. rebate	51 75
		$293 25
	Interest to July 10th, 1875	10 58
		$303 83

J. D. MAYER:

Above I send you statement of amount due me for insurance premiums paid Sun Mutual and Fireman's Cos. I shall go away from the city by the middle of July, and not be back till Sept., and I wish to get this money before I leave. Please let me know how you will settle it.

WM. WALSH.

[Exhibit F to the original bill is in the words and figures following, to wit:]

48 EXHIBIT "F."

JOHN D. MAYER & CO. TO WILLIAM WALSH.

1875.—Feb'y 15.	To cash paid the Sun Mutual Insurance Co. of New Orleans, for insurance on Barnes Hotel, Miss. City, $6,000, at 3½ per cent.	$210 00
" March 28.	To cash paid Fireman's Insurance Co., New Orleans, for insurance on Barnes Hotel, Miss. City, $4,500, 3 per cent.	135 00
		$345 00
	Less 15 per cent. rebate	51 75
		$293 25
1876.—March 28.	To cash paid Fireman's Insurance Company, New Orleans, for insurance on Barnes Hotel, Miss. City, $6,000, for 6 mos., 1½ per cent.	90 00
		$383 25
	Interest to Dec. 1st, 1879, at 6 per cent.	103 37
		$486 62

NEW ORLEANS, *Dec'r 1st*, 1879.

[Exhibit "G" to said original bill is in the words and figures following, to wit:]

EXHIBIT G.

49 THE STATE OF MISSISSIPPI, *Harrison county:*

Know all men by these presents, that John D. Mayer, Frederick Mayer, and Henrietta Polydore, of said county and State, doing business in the Barnes Hotel, under the firm name and style of J. D. Mayer & Co., for and in consideration of the sum of two thousand five hundred and nine dollars and seventy-six cents, to them in hand paid by the Union National Bank of New Orleans, a corporation domiciliated in the city of New Orleans, in the State of Louisiana, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold, and delivered, and by these presents do give, grant, bargaid, sell, and deliver unto the said Union National Bank of New Orleans, and to their successors in office, certain pieces or parcels of land situate in county and State of Mississippi, which said pieces or parcels of land are bounded and de-
50 scribed as follows, to wit: The first piece or parcel of land is described as follows: Known as Barnes Hotel, commencing on the sea-shore or Mississippi Sound, at the southeast corner of the land of Mrs. Martha A. Davis, and running from thence due east on the sea-shore to a street or public road called

Texas street, and from thence running north to the township line, between township seven and eight, range eleven west; thence due west with said township line —— feet, more or less, to the east line of the land of Mrs. Martha A. Davis; thence south to the place of beginning, bounded south by the sea-shore or Gulf of Mexico, north by said township line, west by Martha A. Davis, east by Texas street; 2, a certain tract of land, adjoining the property above described and know as the lot on which is situated the billiard room and bar of the Barnes Hotel, bounded and described as follows, to wit: Commencing at a stake on the sea-shore or Gulf of Mex-
51 ico, on the east side of the road or street called Texas street, and running thence along the said Gulf east 334 feet, more or less, to the southwest corner of property formerly belonged to George Wigg, now Mrs. J. D. Mayer; thence north with the line of said Wigg's lot about one-eighth of a mile to the southeast corner of S. Callen's lot; thence west with the line of S. Callen's lot 334 feet, more or less, to the road or street called Texas street; thence south with said street to the place of beginning, bounded south by the Gulf of Mexico, north by S. Callen's property, west by Texas street, and east by the Wigg or John D. Mayer wife's lot, all in section one, township 8 south, of range 11 west, together with all and singular the lands, tenements, and hereditaments thereto belonging or in any way appertaining.

To have and to hold the above-granted lands, tenements, and hereditaments unto the said Union National Bank of New
52 Orleans and their successors in office forever.

This conveyance is made in trust, and upon this condition: Whereas the said J. D. Mayer & Co. have this day made, executed, and delivered to, their certain promissory note, of even date with this conveyance, for the sum of two thousand five hundred and nine dollars and seventy-six cents, and made payable to their own order four years after date, for value received, with six per cent. per annum from date until paid.

Now, if the said J. D. Mayer & Co. shall well and truly pay said note at maturity and the interest annually as the same shall become due and payable, then this conveyance to be void; otherwise, to remain in full force and effect.

Witness our hands and seals on the 24th day of June, A. D. 1878.

J. D. MAYER. [SEAL.]
C. F. MAYER. [SEAL.]
H. POLYDORE. [SEAL.]

THE STATE OF MISSISSIPPI, *Harrison County:*

Personally appeared before me, F. S. Hewes, clerk of the
53 chancery court of said county and State, the within-named John D. Mayer, Frederick Mayer, and Henrietta Polydore, who each acknowledged that they signed, sealed, and delivered the

foregoing deed of mortgage on the day and year therein mentioned, as their act and deed.

Given under my hand and seal of court, at Mississippi City, this 24th day of June, 1878.

[SEAL.] F. S. HEWES, *Clerk.*

THE STATE OF MISSISSIPPI, *Harrison County,* } ss:

I, F. S. Hewes, clerk of the chancery court of said county and State, do hereby certify that the instrument of writing and the certificate of the acknowledgment thereof, of which the foregoing is a true and correct record, was filed in my office for record, at 6 o'clock p. m., on the 2d day of July, A. D. 1878, and duly recorded in the said office on the day of the date hereof, in Record of Deeds Book No. 16, pages 191, 192, and 193.

54 Witness my hand and seal of said court, at Mississippi City, this, the 3d day of July, A. D. 1878.

[SEAL.] F. S. HEWES, *Clerk.*

THE STATE OF MISSISSIPPI, *Harrison County,* } ss:

I, F. S. Hewes, clerk of the chancery court of said county, do hereby certify that the annexed and foregoing four pages contain a true and correct transcript of a deed of mortgage from J. D. Mayer & Co. to the Union National Bank of New Orleans, La., dated June 24th, 1878, as the same remains of record in my office in Record of Deeds Book No. 16, pages 191, 192, and 193.

Given under my hand and seal of said court, at Mississippi City, this 13th May, 1879.

[SEAL.] F. S. HEWES, *Clerk.*

[Exhibit C 2 to said bill is in the words and figures following, to wit:]

55 Circuit Court, October Term, A. D. 1876.

UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES.

Now comes J. D. Mayer, Frederick Mayer, and Henrietta Polydore, partners in Barnes hotel, doing business under the firm name and style of J. D. Mayer & Co., for answer to the writ of attachment and garnishment served on them in the above case, for answer say that the process of garnishment in this case was personally served on each of them on the 23d day of November, 1874.

They answer and say that on the 2d day of January, 1866, they made, executed, and delivered to William Barnes their certain promissory note in writing, for the sum of seven thousand five hundred dollars, to their own order, and by them endorsed to

said William Barnes, said note made payable two years after date, with interest at 6 per cent. per annum from date until maturity, and 10 per cent. from maturity until final payment;
56 said note was due Jan'y 2d, 1868, and that they have paid upon said note, in the way of excess of interest and compound interest, and deducting these several amounts paid in this way leaves a balance on said note of about $2,509.76; and whatever is due is owing to William Barnes, as Barnes called upon them after the service of garnishment in this case, and claimed the interest upon said note referred to. They say that said promissory note is barred by the statute of limitations, and for that reason they do not owe the said W. Barnes or the holder of said note anything, and claim the benefit of the statute of limitations of six years as fully as though specially pleaded and interposed in this case, and that they had no effects of W. Barnes in their hands or possession at the time of the service of the garnishment in this case, or now, and they know of no other person or persons who are indebted to the said W. Barnes, or of any one
57 hat have effects of said Barnes in their hands or possession.

Having fully answered, now prays to be hence dismissed with their reasonable costs and charges.

Oct. 24th.

J. D. MAYER.
C. F. MAYER.
H. POLYDORE.

STATE OF MISSISSIPPI, *Harrison County.*

Personally came and appeared before me, F. S. Hewes, clerk of the circuit court in and for said county and State, the above-named John D. Mayer, Frederick Mayer, and Henrietta Polydore, who being duly sworn, upon oath each of them say that the matters and things set forth are true as therein stated.

Sworn to and subscribed before me, on the 24th day of Oct., 1876.

F. S. HEWES, *Clerk.*

Filed Oct. 25, 1876.

F. S. HEWES, *Clerk.*

58 THE STATE OF MISSISSIPPI, *Harrison County,* } ss:

I, F. S. Hewes, clerk of the circuit court of said county, do hereby certify that the foregoing and annexed is a true and correct copy of the answer of J. D. Mayer & Co. as garnishees, filed Oct. 25th, 1876, in the case of the Union National Bank of New Orleans against William Barnes, No. 1575 of said court, as the same remains on file in my office.

Witness my hand and seal of said court at Mississippi City, this 13th May, A. D. 1879.

[SEAL.] F. S. HEWES, *Clerk.*

[And on the said 29th day of December, A. D. 1879, a summons

was issued in said cause, which, with the return of the marshal thereon, is in the words and figures following, to wit:]

59 UNITED STATES OF AMERICA, } ss:
Southern District of Mississippi, }

The President of the United States to the marshal of the southern district of Mississippi, Greeting:

You are hereby commanded without delay to summon John D. Mayer, Charles F. Mayer, Henrietta Polydore, and Roderick Seal, defendants, citizens of the State of Mississippi, to appear before the circuit court of the United States for the southern district of Mississippi, at the city of Jackson, at rules to be holden in the clerk's office of said court, on the first Monday in February next, to answer a bill in equity exhibited against them by William Walsh, a citizen of the State of Louisiana, and unless they shall enter their appearance therein, in the clerk's office aforesaid on or before the time specified above, the said bill will be taken for confessed.

And have there and then this writ, and how you have ex-
60 ecuted the same.

Witness the Honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, this 29th day of December, A. D. 1879, and in the 104 year of the Independence of the United States of America.

[SEAL.] JOS. M. McKEE, *Clerk.*

Return.

Executed the within writ by reading and handing copies of the same to John B. Mayer, Charles F. Mayer, and Henrietta Polydore, in person at Mississippi City, Mississippi, this 16th day of January, A. D. 1880.

THOMAS W. HUNT, *U. S. Marshal.*
Per CHARLES A. WERESCHER, *D'y.*

Returned executed on Roderick Seal, personally, and by delivering him the true copy hereof, Jan'y 20, 1880.

THOMAS W. HUNT, *U. S. M.*
By WILL. EDWIN COGE, *D'y.*

[And on the 2d day of February, 1880, the defendants to said bill entered their appearance, in the words and figures following, to wit:]

61 Circuit Court of the United States, for the Southern District of Mississippi.

The defendants, R. Seal, John D. Mayer, Charles F. Mayer, and Henrietta Polydore enter their appearance to the suit, William Walsh, in the circuit court aforesaid.

W. P. HARRIS, *Sol'r.*

Feb'y 2d, 1880.

62 [And on the 22 day of May, A. D. 1880, the following interlocutory decree was made and entered in said cause:]

WILLIAM WALSH
vs. } 297.
JOHN D. MAYER *et als.*

This day came complainant, and by leave of court amended his bill by making sundry allegations touching the attachment suit of the Union National Bank of New Orleans against William Barnes and the execution of the mortgage by defendants to said bank in pursuance of an adjustment in said cause, and by suggestions that Schmidt & Zeigler, of Louisiana, as well as said Union National Bank, had an interest in the matter herein involved, and could not be made parties without evicting this court of jurisdiction; and thereupon the said Union National Bank and the said Schmidt & Zeigler having been duly notified of pendency of the suit by
63 their solicitor, W. P. Harris, entered their appearance as defendants and confessed the jurisdiction of the court, and asked leave to implead the complainants, which is granted; and by consent of parties it is now ordered, adjudged, and decreed that all of the defendants have leave to answer the complainants' bill within ninety days, as of the present term of the court, and that complainants have leave to reply to the answers filed as of the present term, so that proof may be taken and this cause heard and determined at the next term of this court.

[And on the 19th day of August, A. D. 1880, the joint and several answers of John D. Mayer, Charles F. Mayer, and Henrietta Polydore was filed in said cause, as in the words and figures following, to wit:]

64 UNITED STATES OF AMERICA:

In the Circuit Court of the United States, for the Southern District of Mississippi. May Term, 1880.

The joint and several answers of John D. Mayer, Henrietta Polydore and Charles F. Mayer, members of the firm of J. D. Mayer & Co., to the bill of complaint of William Walsh, filed in said court against them and others.

Respondents, saving all objections to defects of law in said bill contained, for answer thereto say, that on the 20th day of February, 1866, respondents bought of William Barnes, of New Orleans, Louisiana, the property described in said bill and known as the Barnes Hotel, at Mississippi City, in the State and district first aforesaid, for the price of $25,000 dollars, of which sum they paid down in cash $10,000, and gave their two notes for the balance in equal amounts, one due Jan'y 2nd, 1867, and the other due
65 Jan'y 2nd, 1868, which notes bear interest at 6 per cent. from date until maturity, and 10 per cent. after maturity until

paid, and with the statement herein made they admit the allegations of the bill as to the making of the said notes.

Respondents answering say, that at the time of the giving of the said notes, it was understood between respondents that they would become partners, and equal partners, in the business of keeping the said hotel, and were equal contributors in the purchase for that purpose, and did conduct the business as a firm known as J. D. Mayer & Co.

Respondents answering say, that to secure these notes respondents John D. and the said Chas. F. Mayer, and Henrietta Polydore executed a deed of trust jointly on the said hotel property to R. Seal,
as trustee, and they admit that the said deed is exhibit (B)
66 of the said bill, and that the said notes were made payable
to the order of the makers, and endorsed in blank to facilitate their negotiability, and that exhibit (A) to said bill is one of said notes, and both were delivered to the said William Barnes.

Respondents answering deny that any part of said note, exhibit (A,) as aforesaid is due, that the first of said notes which fell due was with all interest thereon fully paid, and that the note, exhibit (A,) was at the date of the filing of the complainant's bill barred by the statute of limitations of six years as appears from the face thereof, and as the fact was, more than six years having elapsed from the maturity thereof before the filing of said bill, and respondents insist upon the statute of limitations as a complete bar to said note and the bill.

Respondents answering deny that there was at the time
67 the said notes were given, or at any time subsequent thereto,
any agreement verbal or written by which the original terms of the said notes, and of the deed of trust were changed or modified, that at no time did said Barnes even agree to postpone the payment of the principle of said notes or the enforcement of the said deed of trust in consideration of the payment of the interest by the makers, and respondent avers that the said Barnes never did promise or bind himself to forbear suit, or to give further time, nor did the makers of said notes ever bind themselves to allow the said notes to run at interest, or preclude themselves from paying said notes at any time after maturity according to their tenor, and so respondent denies that at the time of giving the said notes, it was agreed by and between the said Barnes and respondent or either of
them, that the said notes were to be treated as an investment
68 on interest, and that said makers were to have as long a time
to pay the notes as they might see fit or desire, if they would pay interest on the same. It may be that said Barnes was willing to postpone collection so long as he could get interest paid at the rate he desired—but he would not and did not tie his hands against enforcing the payment by any of the means he was by law authorized to take.

Respondents further deny that said Barnes threatened to foreclose the said deed of trust unless payment was made of the interest

on the note sued on, and the balance of principal of the note first due were paid as stated in said bill, and that in consideration of his forbearance the respondents, or either of them, promised to pay the interest; on the contrary, respondents state that said Barnes, while very urgent at times to get his money never threatened to
69 foreclose the deed of trust, and respondents, makers of the notes, never at any time asked delay as a condition or consideration for any payment of interest or promise to pay interest.

Respondent states that on the maturity of the note which fell due Jan'y 2d, 1867, part of the principal had been paid, and on the suggestion of said Barnes that he ought to have more interest than ten per cent., to wit, 15 per cent., respondent agreed to increase the rate of interest and did increase it to 15 per cent. on that note, and did the same on the maturity of the 2d note, without any contract or promise on the part of said Barnes to give time, definitely or indefinitely, and respondents would not engage to pay interest for any definite time at such rate, but were confident that so long as they chose to pay interest at that rate the said Barnes would not take any steps to enforce payment.

70 But no terms as to time were ever agreed on. That the arrangement entered upon at maturity of the 1st note, was that the respondents give a note for the interest to accrue, which was fifteen per cent. on the amount due on the original notes, but for what time interest notes had to run, when given, respondents cannot now recollect, or whether in every instance notes were given.

The said hotel was a summer resort, and the principal notes falling due in Jan'y, when there was no income from the business the interest notes were made payable when given, in August, September, and October, but not for a year as will appear hereafter, and when the interest notes were paid the said Barnes credited the note with the interest, without stating the amount. The credit entered on said note of Jan'y 2d, 1868, referred to interest which had accrued at 6 per cent. before maturity.

Respondents deny that the interest notes were given to be
71 discounted to raise the interest due, as stated in said bill, but were given for interest on the principal note calculated at 15 per cent. per annum, and so far as respondent knows or believes they never were discounted, but were held by and paid to Barnes himself.

Respondent desires that there was a sequence of annual renewals or extensions on payment of interest, or any agreement that such extension should take place.

It was a contrivance by said Barnes to get usurious interest without effecting the original note and deed of trust, and hence he entered into no contract to alter the terms of the original note or deed of trust.

The interest payments were independent arrangements to be cont nued or not, as the parties might see fit. The only understanding ever had on the subject took place in Jan'y, 1867, and respond-

ent states that the said Barnes was at liberty at any time after
72 January, 1868, to disregard the interest notes and sue on the note or enforce the deed of trust.

The policy of said Barnes was to have it in his power always to rely upon and enforce the original note according to its terms, unfettered by the usurious interest notes, and hence he made no alteration in the terms thereof or time of payment, and respondents gave the notes for interest with the expectation that said Barnes would prefer to take them rather than enforce the original note for 10 per cent. interest, and respondents deny that there was ever a contract, express or implied, made to extend the time of said note at all, or that any such thing took place or an annual contract for a year more time, or any contract at any time for extension of time. The said Barnes knew that if he sued on the original note he would have to depend on its terms as to interest, and forbear to sue
73 for that reason. Respondents answering, deny that in Jan'y, 1868, or at any time, there was any proposition as to paying the premiums on fire policies as connected with any agreement to give time on the note sued on. That was a matter distinct from the note and rested on an independent agreement to pay for money advanced by said Barnes in renewing policies by giving notes for them, and the amounts were sometimes included in the interest notes.

The said Barnes was anxious the policies should be kept alive and renewed because the hotel building was his chief security, and he got his money back with 15 per cent. interest, and respondents positively state that the alleged annual agreement or agreements between Jan'y 2d, 1868, and Jan'y 2d, 1874, are pure fictions; there was no contract to extend time from year to year, nor any contract to extend the time from one time to any other time
74 in the future, and all allegations to that effect in the said bill are untrue; so respondents, giving the particulars, deny that there was such contract in September, 1873, and in September, 1874. The only contracts were the notes given, and they ceased to be given after May 12, 1874.

Respondents answering, say, that there never was any promise by the makers of said note to pay the same, except that contained in the note itself, and no agreement by said Barnes to depart from its terms, or by which he was bound not to sue on it at any time he saw fit after Jan'y 2nd, 1868, or by which respondents should continue.

It was his arrangement, whether good or bad, whether effectual or not, to be in a position at any time, to transfer the note in market free as it was on its face from any contract altering or affecting it, or to sue on it if he saw fit.

Respondents answering, say, that the last notes given were
75 those of May 12th, 1874, which matured in August and September, of that year, and they constituted the last payment

made of interest notes, and are entered as a credit on the notes of September 1st, 1874.

These interest notes include the premiums of insurance, and were held by said Barnes, and paid to him in person in September, 1874, and entered by him as of September 1st, 1874. At the time of this payment, there was no agreement to extend time at all, as alleged in the said bill.

Respondents answering, state that the said Walsh was not the owner of the said note; that the said Barnes told them that he was the *bona fide* owner of the note after Walsh claimed it, and told them that said note was in his secretary in his residence in the city of New Orleans, and that he did not intend to sell said note, nor
76 the interest notes falling due in 1874. Barnes was, at this time, making shifts to secrete his effects to avoid his creditors; and that Barnes was then in possession of said interest notes, and the principal note, and demanded payment of the interest and received it; and had said note then in his possession and was not endorsed; it is true that respondent, J. D. Mayer, mentioned that complainant had written about the said note; but said Barnes said to respondent, J. D. Mayer, you, of course, understood how the thing really stands, and from this, respondents understood him to mean that complainant's ownership was only nominal. Barnes cautioned respondents not to let it be known that they owed him anything.

Respondents answering say they supposed Barnes to be the real owner of the notes notwithstanding the letter of complaint to them, written in June, 1874, knowing his pecuniary embarrassment, and finding said Barnes in possession of the notes afterwards,
77 and the interest notes payable to him only and unendorsed by him, and before paying which respondents required him to endorse the same, which he did by blank endorsement, so that afterwards when respondents, about the 23d of November, 1874, was served with process of garnishment at the suit of the Union National Bank of New Orleans, a creditor of said Barnes, they really believed, and they still believe and charge the fact to be, that said Barnes was the real owner of the interest notes, and the real holder of the note Exhibit (A,) so that when they came to answer the said garnishment, in October 28th, 1876, while insisting that the note was barred by the statute of limitations, they stated that if anything was due to any one it was due to said Barnes; they also insisted that independent of the statute of limitations the unpaid balance on said note, Exhibit (A,) deducting or crediting the usurious
78 interest paid was the sum stated in their said answer to the garnishment.

Respondents, further answering, deny that in any letter or by any writing or verbal communication to Barnes or the complainant, they acknowledged the said note, Exhibit (A,) to be due, or any part thereof, after January 2d, 1874.

They severally did write the letters ascribed to the writers thereof,

as set forth in said bill, and they confidently refer to them as containing no promise or acknowledgment, taken separately or together, that said note was then due, or promise to pay the same, as from an inspection will appear.

Respondents, further answering, say that said Barnes having died in the spring of 1879, the proceedings by the Union National Bank against his effects was delayed, but finally an administrator of the said Barnes, appointed by the chancery court of Harrison
79 county, in the State of Mississippi, appeared to the said suit; and respondents, further answering, state that not only was said administrator a party to said proceedings, but the complainant was also, by due service of process as a garnishee and appearance, a party to the same, and was fully cognizant of them and their import, and did not propound any claim to the said note, and for the reason that it could have been successfully refuted, as respondents believe; that being pressed by the proceedings of the said bank, respondents entered into a compromise with it, and agreed, as a mere compromise and settlement, to pay the said unpaid balance, after deducting the excess of interest, or crediting it, treating as payment *pro tanto* of the principal of said note, Exhibit (A,)—the bank agreeing to give four years' time, at 6 per cent. interest, secured by the mortgage, Exhibit (E,) to complainant's
80 bill. Respondents deny that in any writing they meant to acknowledge in the compromise with the said bank that the note, Exhibit (A,) was legally due. After the terms were agreed on, they simply gave their note to the bank and executed the mortgage in compliance with said terms, and for the purpose of said compromise, and for no other purpose. And they insist, moreover, that the said Walsh was cognizant of the proceedings, and made no protest or objection, and that the said proceedings and settlement are a complete bar to any relief which he now seeks. A transcript of said proceedings in attachment and garnishment are therewith filed as Exhibit No. (1) to this answer.

Respondents are well satisfied from the conduct and declaration of said Barnes that he still owned the note, Exhibit (A,) at the time of the service of the garnishment, and thought it best to com-
81 promise on the liberal terms proposed by the bank; and they are advised, and so insist, that neither their answer to the garnishment nor their compromise had the effect of an acknowledgment or promise to pay the said note, and so they insist that the said note was and is barred by the statute of limitation; that complainant was not the owner of it when the garnishment was served, and that the unpaid balance on said note—never supposing that any part was due—did not exceed the sum stated in said answer to said garnishment, which gave legal interest. But if the matter is to be re-opened on the claim of said Walsh, the complainants say they not only plead the statute of limitation, but the statute of usury and forfeiture of all illegal interest, and that the

whole excess paid on both notes after maturity shall be credited as payments on the note, Exhibit (A.)

82 Respondents further answering, deny that said Barnes was induced by any request of, or that such request was ever made by respondents to delay the collection of the note, Exhibit (A.) The indulgence, if such it may be called, was, as he supposed, a source of profit to him, and, as the respondents were informed and believe, he would have commenced proceedings earlier, but he had become greatly involved, and he was induced not to make public his ownership of the note Exhibit (A.) His indulgence was his own scheme, with every advantage on his own side, as he supposed.

It was just such indulgence as in countless cases gives rise to the plea of the statute of limitations, and against which no equity arises.

83 Respondents deny that the said interest notes recognized in any form the note Exhibit (A,) to be due. There was no purpose that they should appear to have reference to it, and they say that after Sept., 1874, they did not solicit Barnes or Walsh to insure the property, and after the garnishment proceedings the insurance was effected by the said Barnes or complainant, if effected at all, on their own motion and to subserve their purposes. Respondents answering call the attention of the court to the form of the credits entered by Barnes on the back of the note Exhibit (A,) which on their face import that the interest, according to the tenor of the note, had been paid, and state that the object of said Barnes in so entering credits was to carry out his plan, which was to have the note unaffected by the usurious interest notes.

84 Respondents have been unable to find any of the interest notes, save one of the last given and paid; the others were destroyed or have been lost, but the one produced here as Exhibit No. (2) to this answer is a sample of them all, as respondent recollects them.

This note given 12th of May, 1874, and payable 1st and 4th of August, thereafter, was delivered to Barnes, and when paid was in his possession as was the note Exhibit (A.)

The said Barnes at the time he collected the note above exhibited, and another of like amount and tenor, due Sept. 1st, 1874, which has been mislaid or lost, himself endorsed the credit on the principal note, and on respondent's demand, endorsed both in blank; and respondents remember that said Barnes requested them not to let it be known that they owed him anything, when however, they were summoned in November following, at the suit of said bank, as debtors to said Barnes, they felt it due to truth to answer that if they owed any one, they owed Barnes on the note aforesaid.

85 Part of the terms of the settlement with the bank, were that the judgment of the court in their favor, on the statute of limitation and other defences, endered by the circuit court of Harrison county, at the October term, 1876, on their aforesaid an-

swer, and discharging them, should stand unappealed from. And as respondents understood the matter, the dismissal of the proceedings against the complainant, which were not final as to any party, as will appear from the transcript, resulted from this settlement, otherwise the answer of said Walsh would have been then contested; and this action of the court, and the compromise, respondents plead specially in bar of this suit. And having fully answered, respondents pray to be hence dismissed, &c.

JOHN D. MAYER,
CHAS. F. MAYER,
HENRIETTA POLYDORE,
By W. P. HARRIS, *Sol'r.*

86 THE STATE OF MISSISSIPPI, *Harrison County.*

Personally appeared before the undersigned, James B. Mitchell, commissioner for the United States circuit court for the southern district of Mississippi, the within-named respondents, who being duly sworn, upon their several oaths stated that the matters and things set forth in their within and foregoing answer, so far as stated to be of their own knowledge, are true, and so far as stated to be on the information of others they believe to be true.

Sworn to and subscribed before me, on the 16th day of August, 1880.

JOHN D. MAYER,
CHARLES F. MAYER,
HENRIETTA POLYDORE.

Given under my hand and seal of office, the 16th day of August, 1880.

J. B. MITCHEL,
U. S. Commissioner.

87 [Exhibit No. 1, to the answer of J. D. Meyer & Co., is in the words and figures following, to wit:]

88 THE STATE OF MISSISSIPPI, }
Harrison County, }

Be it remembered that a regular term of the circuit court of Harrison county, in the State of Mississippi, was begun and held at the court-house of said county, in the town of Mississippi City, in said county, on the third Monday after the fourth Monday of April, A. D. 1879, beginning the 19th day of May, A. D. 1879, the same being the day and place designated by law for holding said court.

Were present and in attendance on said court the Honorable Jas. S. Hamm, judge of the 7th judicial circuit court district of the said State of Mississippi, herein solely presiding, Thomas S. Ford, district attorney of the seventh district, A. K. Northrop, sheriff of said Harrison county, and F. S. Hewes, clerk of said court.

Affidavit and Bond for Attachment.

THE STATE OF MISSISSIPPI,
Harrison County,

89 Be it remembered that on the 23d day of November, A. D. 1874, personally came and appeared before me Thomas Bond, a justice of the peace in and for said county, William A. Champlin, agent of the Union National Bank of New Orleans, a corporation domiciliated in the city of New Orleans, in the State of Louisiana, who, being first duly sworn according to law, deposeth and saith that William Barnes is justly indebted to said Union National Bank in the sum of four thousand four hundred and fifty-six dollars and eighty-five cents ($4,456.85), due upon a judgment obtained against him and John P. Williams and W. P. & F. M. Williams, composing the firm of John Williams & Sons, *in solido*, in the 5th district court for the parish of Orleans, in the State of Louisiana, on the 22d day of June, A. D. 1874, and signed June 26th, 1874; and deponent further saith that said William Barnes is a non-resident of the State of Mississippi, and is a resident and citizen
90 of the city of New Orleans, in the State of Louisiana, and post office is in said city.

W. A. CHAMPLIN.

Sworn to and subscribed before me, the 23d day of November, 1874.

THOS. BOND, *J. P.* [SEAL.]

Know all men by these presents that the Union National Bank of New Orleans, a corporation domiciliated in the city of New Orleans, in the State of Louisiana, as principal, and Elliot Henderson, as securities, are held and firmly bound unto William Barnes, in the sum of eight thousand nine hundred and thirteen dollars and seventy cents, ($8,913.70,) for the payment of which sum well and truly to be made, we hereby bind ourselves and our successors and heirs, executors and administrators, jointly and severally firmly by these presents; signed with our hands, and sealed with our seals, and dated this [—] day of November, A. D. 1874.

The condition of the above obligation is such that whereas
91 the above bound Union National Bank of New Orleans, hath on the day of the date hereof prayed an attachment at the suit of said Union National Bank against the estate of the above named William Barnes for the sum of four thousand four hundred and fifty-six dollars and eighty five cents ($4,456.85,) and hath obtained the same, returnable to the circuit court of the county of Hainson, in the State of Mississippi, at a term thereof to be held at the court-house of said county, at Mississippi City, on the third Monday of April next, A. D. 1875. Now if the said plaintiff in said attachment shall well and truly pay, and satisfy to the said defendant all such damages as he shall sustain by reason of the wrongful sueing out of the said attachment, and shall also pay all

costs which may be awarded against the said plaintiff in said suit, then the above obligation to be void, otherwise to remain in full force and effect.

C. KOHN, [SEAL.]
President of Union National Bank.
92 By W. A. CHAMPLIN, *Agent.*
ELLIOT HENDERSON, [SEAL.]

This bond and security approved by me Nov. 23d, 187 .
THOS. BOND, *J. P.*, [SEAL.]

Filed Dec. 21st, 1874.
L. L. DAVIS, *Clerk.*

Writ.

THE STATE OF MISSISSIPPI,
Harrison County:

To the sheriff of said county, Greeting: Whereas William A. Champlin, agent of the Union National Bank of New Orleans, a corporation domiciliated in the city of New Orleans, in the State of Louisiana, hath this day complained on oath, by affidavit before me Thomas Bond, a justice of the peace, in and for said county, that William Barnes is justly indebted to the said Union National Bank, in the sum of four thousand four hundred and fifty-six dollars and eighty-five cents ($4,456.85,) or thereabouts due by a judgment obtained by said bank in the 5th district
93 court for the parish of Orleans, in the State of Louisiana, on the 22d day of June, A. D. 1874, against said Barnes and others *in solido*, and oath having also been made before me, that said William Barnes is a non-resident of the State of Mississippi, and resides in the city of New Orleans, in the State of [Louisiana,] and that his post office is in that city, and bond with security having been given to me pursuant to the statute, you are therefore hereby commanded to forthwith attach the estate, real and personal, of the aforesaid William Barnes, in your county, to the full value of said demand and the probable cost of this proceeding, and that you safely keep the property so attached or levied upon in your hands unless replevied according to law, so as to compel the aforesaid William Barnes to appear before the circuit court of Harrison county, in the State of Mississippi, to be held at the court-house
94 thereof, in Mississippi City, on the third Monday of April next, A. D. 1875, to answer unto the complaint of the aforesaid Union National Bank, and that you summon the said defendant, William Barnes, if to be found in your county, to be and personally appear at the court aforesaid on the first day of the term above named, then and there to answer accordingly.

And the said plaintiff in attachment having suggested to me that John D. Mayer, Frederick Mayer, and Henrietta Polydore, doing business under name, firm, and style of John D. Mayer & Co., are indebted to said William Barnes, or have property of his in their

hands, or know of some other person or persons who are so indebted to him, or who have effects or property of said Barnes in their hands. You are therefore commanded to summon the said John D. Mayer, Frederick Mayer, and Henrietta Polydore to appear on the return day of this attachment and answer in writing as garnishees
95 of the defendant in this attachment, and serve each of them with a copy of this writ.

Witness my hand and seal this 23d day of November, A. D. 1874.

THOS. BOND, *J. P.* [SEAL]

Sheriff's Return.

Rec'd the within in my office, Nov. 24th, 1874.

A. J. RAMSAY, *Sh'ff.*

Executed the within process this day, by levying upon the following described real estate: one lot or parcel of land bounded south by property of J. D. Mayer & Co., west by property of L. L. Davis, north by township line between townships 7 and 8 south, of range 11 west, and east by property of Stephen Callen and Mrs. Ross, containing twenty acres, more or less, in section one, township 8 south, range 11 west, in said county of Harrison, State of Mississippi. Further executed by summoning J. D. Mayer, Frederick Mayer, and Henrietta Polydore, on the 24th day of November, 1874, and William Walsh, on Dec. 13, 1874, personally and by de-
96 livering to them a true copy of this writ, 1874, to appear at next term of circuit court, on the return day of this attachment, to appear and answer as garnishees, on oath, what they, or either of them are indebted to said Wm. Barnes, or was at the time of the service of this writ, or what effects of said Barnes they or either of them had in their hands at the time of the service of this writ, or what effects or debts of said Barnes there are in the hands of any other persons to their knowledge or belief. The within-named Wm. Barnes could not be found after diligent search and inquiry.

A. J. RAMSAY, *Sheriff.*

Complaint.

In the Circuit Court. To April Term, 1875.

THE STATE OF MISSISSIPPI, *Harrison County.*

UNION NATIONAL BANK OF NEW ORLEANS, Plaintiff,

vs.

97 WILLIAM BARNES, Defendant.

Tne Union National Bank of New Orleans, a corporation domiciliated in the city of New Orleans, in the State of Louisiana, plaintiff, by Champlin & Henderson, attorneys, complains of William Barnes, who has been attached by his goods and chattels and lands and tenements and duly summoned to answer defendant.

For that, whereas the plaintiff, in the fifth district court for the

parish of Orleans, in the State of Louisiana, by the consideration of said court, recovered a judgment against the said defendant, John Williams, W. P. Williams, and F. M. Williams, *in solido*, on the 26th day of June, A. D. 1874, for the sum of forty-two hundred and thirty-six $\frac{81}{100}$ dollars, with eight per cent. interest per annum thereon from March the 30th, 1874, until paid, three $\frac{50}{100}$ dollars national fees and costs of suit, which judgment was rendered on the 22d day of May, 1874, and signed on the 26th day of May,
98 1874, as by the record thereof in said fifth district court of the parish of Orleans remaining appears, which said judgment remains in full force, unreserved, and unsatisfied, whereby an action has accrued to the plaintiff to demand and have from said defendant the sum aforesaid, amounting to the sum of four thousand four hundred and fifty-six dollars and eighty-five cents, with interest and costs.

Yet the said defendant nor the said John Williams, W. P. Williams, and F. M. Williams, who are not sued in this action, have not paid said sum of money, or any part thereof, although due and unpaid, and although often requested to pay the same, but so to do have hitherto *have* failed and refused, and still do fail and refuse, to pay the same, wherefore plaintiff sues and prays judgment for the sum of five thousand dollars and costs of suit, &c.

CHAMPLIN & HENDERSON,
Att'ys for Plff.

99 And the plaintiff files herewith a certified copy of the judgment sued on.

CHAMPLIN & HENDERSON,
Att'ys for Plff.

Filed Dec. 21st, 1874.
L. L. DAVIS, *Clk.*

Certified Copy of Judgment.

State of Louisiana, Fifth District Court for the Parish of Orleans.

UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES AND JNO. WILLIAMS & SONS. } No. 5780.

Petition. Filed May 15th, 1874.

To the Honorable the Judge of the Fifth District Court for the Parish of Orleans:

The petition of the Union National Bank of New Orleans, a corporation domiciliated in New Orleans, respectfully shows that William Barnes, John Williams, W. P. Williams, and F. M. Wil-
100 liams, composing the commercial firm of John Williams & Sons, domiciliated and doing business in New Orleans, and all the aforesaid parties residents of New Orleans, are indebted *in solido*

unto petitioner in the sum of four thousand two hundred and thirty-six $\frac{81}{100}$ dollars ($4,236 $\frac{81}{100}$), with interest at 8 per cent. from March 30th, 1874, until paid, $3.50 notarial fees and stamps and costs of suit for this, to wit:

That petitioner is the holder and owner of a certain promissory note made New Orleans, Dec. 29th, 1873, by the said William Barnes, payable ninety days after, to the order of Jno. Williams & Sons, duly endorsed. That at the maturity thereof, the petitioner caused payment of the note to be duly demanded of the maker, and such payment was refused, and that the petitioner caused the note to be duly protested for non-payment, and notice accordingly duly served upon the endorsers, and that the latter now refuse to pay the note; all of which will better appear by the note here referred to, which, as well as the accompanying protest and

101 certificate of notice, are made part of this petition.

Wherefore petitioner prays that the said William Barnes, and the commercial firm of Jno. Williams & Sons, and the said Jno. Williams, W. P. Williams, and F. M. Williams, severally and individually, be duly cited to appear and answer this petition, and after regular proceedings had, that petitioner do recover judgment *in solido* against the said William Barnes, Jno. Williams, and W. P. Williams, and F. M. Williams, for forty-two hundred and thirty-six $\frac{81}{100}$ dollars, ($4,236.81,) with interest at 8 per cent. per annum from March 30th, 1874, $3.50 notarial fees and costs of suit, and petitioner prays for such further relief as equity, law, and the nature of the case may require.

(Signed) CARLETON HUNT, *Att'y.*

102 *Answer.—Filed June 6th*, 1874.

UNION NATIONAL BANK *vs.* WILLIAM BARNES. } No. 5780. 5 District Court.

Now comes the defendant, William Barnes, who for answer herein respectfully says:

That he denies all and singular the allegations in plaintiff's petition contained, wherefore defendant prays to be hence dismissed with costs.

(Signed) T. WHARTON COLLENS, *Att'y.*

Judgment.

This cause came on this day for trial as to the defendant, William Barnes, and for the confirmation of the judgment by default herein entered against Jno. Williams & Sons. Carleton Hunt for plaintiff. Defendants absent and not represented. When after hearing pleadings and evidence, the court considering the law and evidence to be in favor of plaintiff—

It is ordered, adjudged, and decreed that the judgment by

103 default herein entered on the 1st inst., be now confirmed and

made final, and that there be judgment in favor of the plaintiff, the Union National Bank of New Orleans, and against defendants, Wm. Barnes and Jno. Williams & Sons, Jno. Williams, and W. P. Williams, and F. M. Williams, *in solido*, for the sum of forty-two hundred and thirty-six $\frac{81}{100}$ dollars, with eight per cent. interest per annum thereon from March 30th, 1874, until paid, three $\frac{50}{100}$ dollars notarial fees and costs of suit.

Judgment rendered June 22d, 1874.

Signed June 26th, 1874.

"Signed," E. NORTH COLLOM, *Judge.*

I, Thomas Duffy, clerk of the fifth district court, for the parish of Orleans, do hereby certify that the foregoing to be true and correct copies of the originals now on file in this office.

NEW ORLEANS, *Sept.* 21, 1874.

[SEAL.] THOMAS DUFFY, *Clerk.*

104 I, E. North Cullom, sole judge of the fifth district court, for the parish of Orleans, do hereby certify that Thomas Duffy is the clerk of said court; that the same is a court of record, and that the signature, Thomas Duffy, clerk, to the foregoing certificate is in the proper handwriting of him, the said Thomas Duffy, clerk; to his official acts as such full faith and credit are due and owing; and I do further certify that his attestation is in due form of law.

Given under my hand at the city of New Orleans on the 21st day of September, in the year of Lord one thousand eight hundred and seventy-four.

E. NORTH CULLOM, *Judge.*

I, Thomas Duffy, clerk of the fifth district court, for the parish of Orleans, do hereby certify that E. North Cullom, whose signature appears to the foregoing certificate, is now and was
105 at the time of signing the same, sole judge of the fifth district court, for the parish of Orleans, duly elected and commissioned and qualified as such, and that said attestation is in due form of law.

Witness my hand and seal of said court this 21st day of September, in the year of our Lord one thousand eight hundred and seveny-four.

[SEAL.] THOMAS DUFFY, *Clerk.*

Filed Dec. 21, 1874.

L. L. DAVIS, *Clerk.*

Affidavit of Non-residence, &c.

In the Circuit Court. At April Term, 1875.

THE UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES.

Personally came and appeared in open court W. A. Champlin, one of the attorneys for the plaintiff, who being first duly sworn according to law, deposeth and says that William Barnes,
106 the defendant, is a non-resident of the State of Mississippi, and does reside and is a citizen of the city of New Orleans, in the State of Louisiana, and his post office address is at that place, as he is informed and verily believes, and prays for an order of publication as prescribed by law.

W. A. CHAMPLIN.

Sworn to before me this 23d day of April, A. D. 1875.
L. L. DAVIS, *Cl'k.*

Filed April 23d, 1875.
L. L. DAVIS, *Clerk.*

And afterwards, to wit, at the April term, A. D. 1875, of the circuit court of Harrison county, Mississippi, among other orders then and there made and recorded, were two, in the words and figures following, to wit:

Order.

UNION NATIONAL BANK
vs.
WILLIAM BARNES.
} No. 1575. Attachment.

This day comes the plaintiff, by attorney, and it appearing to the satisfaction of the court, from affidavit on file, that the de-
107 fendant is a non-resident of the State of Mississippi, so that the process of the court cannot be executed against him.

It is therefore considered by the court that the defendant enter his appearance herein, and plead, answer or demur to plaintiff's complaint on or before the third Monday of October next or judgment will be entered by default and proceedings had accordingly.

It is furthered ordered that a copy of this be published in the Hansboro Democrat, a public newspaper, printed and published in the town of Handsboro, in said county, or in the Sea Coast Republican, published in Hancock county, in this State, one or both of them, once a week for four consecutive weeks, and that the clerk of this court transmit by mail a copy hereof to the city of New Orleans, the post office of the defendant—postage paid, properly directed.

Order.

UNION NATIONAL BANK
vs.
WILLIAM BARNES. } 1575.

108 John D. Mayer, Frederick Mayer, and Henrietta Polydore, in this cause, the garnishees summoned herein, are granted, until the next term of this court, time in which to file their answers, having entered their appearance herein.

Affidavit of Mailing.

STATE OF MISSISSIPPI, *Harrison County.*

Personally came and appeared before me, A. J. Ramsey, sheriff of said county and State, F. S. Hewes, clerk of the circuit court of said county and State, who, after being duly sworn, deposes and says that he mailed, postage paid, in the post office at Mississippi City, on the 1st day of March, 1876, a copy of a notice ordered to be published by the hon. circuit court of said county and State in the case of the Union National Bank *vs.* William Barnes, No. 1575, (a copy of which said notice is hereunto annexed,) to wit:

To WILLIAM BARNES, (addressed) *New Orleans, La.*

F. S. HEWES, *Clerk.*

109 Sworn to and subscribed to before me, this 1st day of March, A. D. 1876.

A. J. RAMSAY, *Sheriff.*

Notice.

Attachment Notice.

UNION NATIONAL BANK
vs.
WILLIAM BARNES. } 1575. Attachment Notice.

The defendant in this case, William Barnes, is hereby notified that an attachment was sued out in this case by the said plaintiff, the Union National Bank, against the defendant, William Barnes, before Thomas Bond, a justice of the peace for Harrison county, in the State of Mississippi, for the sum of four thousand four hundred and fifty-six dollars and eighty-five cents, ($4,456.85,) on the 23d day of November, 1874, and obtained the same returnable to the circuit court of said county and State, at a term thereof to be held at the court-house of said county and State at Missis-
110 sippi City on the third Monday of April, 1875, and that said writ of attachment has been returned by the sheriff of said county, levied upon the property of said defendant, William Barnes, and that the defendant is a non-resident of the State of Mississippi; that he has not been found in this county, and that he resides in the city of New Orleans, in the State of Louisiana, and

that his post office is in said city of New Orleans, in said State, where he receives his letters, as the same appears by affidavit filed in this case.

Now, the said defendant is hereby cited to be and appear before the circuit court of said county and State, to be held at the court-house thereof, at Mississippi City, on the third Monday of April next, 1876, and plead to this case, and in default of which appearance judgment by default shall be rendered and the property attached sold, and the effects applied to the payment of plaintiff's claim, and that this notice be published for four consecutive
111 weeks in the Handsboro' Democrat, a public newspaper published and printed in Handsboro', in said county and State; and that the clerk of said circuit court shall immediately forward by mail, postage paid, to the address of the defendant, William Barnes, in the city of New Orleans, in the State of Louisiana, a copy of this order or notice.

Witness my hand and seal of office this 23d day of February, 1876.

[SEAL.] F. S. HEWES, *Clerk.*

Filed March 1st, 1876.

F. S. HEWES, *Clerk.*

Proof of Publication.

THE STATE OF MISSISSIPPI, *Harrison County:*

Before me, H. Crawfoot, J. P., P. K. Mayer, proprietor of the Democrat, a public newspaper printed and published in the town of Handsboro', in said county, who, being duly sworn, did
112 depose and say that publication of the notice hereunto annexed has been made in said paper for the space of five weeks since the date thereof, to wit:

In No. 42, dated 26th day of February, 1876.
In No. 43, dated 4th day of March, 1876.
In No. 44, dated 11th day of March, 1876.
In No. 45, dated 19th day of March, 1876.
In No. 46, dated 25th day of March, 1876.

Said publication beginning on the 26th day of February and ending on the 25th day of March, A. D. 1876.

H. CRAWFOOT, [SEAL.]
Justice of the Peace.

THE STATE OF MISSISSIPPI, *Harrison County:*

I, H. Crawfoot, a justice of the peace in and for said county, do hereby certify that the several numbers of the paper containing the publication hereunto annexed have been produced here before me and compared with said copy, and that I have found the proof thereof to be truly and correctly made.

Witness my hand and seal this 15th April, A. D. 1876.

H. CRAWFOOT, [SEAL.]
Justice of the Peace.

113 *Attachment Notice.*

UNION NATIONAL BANK
vs.
WILLIAM BARNES. } 1575.

The defendant in this case, William Barnes, is hereby notified that an attachment was sued out in this case by the said plaintiff, the Union National Bank, against the defendant, William Barnes, before Thomas Bond, a justice of the peace for Harrison county, in the State of Mississippi, for the sum of four thousand four hundred and fifty-six dollars and eighty-five cents, ($4,456.85) on the 23d day of November, 1874, and obtained the same returnable to the circuit court of said county and State, at a term thereof, to be held at the court-house of said county and State, at Mississippi City, on the third Monday of April, 1875, and that said writ of attachment has been returned by the sheriff of said county, levied upon the property of said defendant, William Barnes, and that the defendant is a non-resident of the State of Mississippi; that
114 he has not been found in this county, and that he resides in the city of New Orleans, in the State of Louisiana, and that his post office is in said city of New Orleans, in said State, where he receives his letters, as the same appears by affidavit filed in this case.

Now the said defendant is hereby cited to be and appear before the circuit court of said county and State, to be held at the court-house thereof, at Mississippi City, on the third Monday of April next, 1876, and plead to this case, and in default of which appearance, judgment by default shall be rendered, and the property attached sold, and the effects applied to the payment of plaintiff's claim, and that this notice be published for four consecutive weeks in the Handsboro Democrat, a public newspaper published and printed in Handsboro, in said county and State, and that the clerk of said circuit court shall immediately forward by mail, postage paid, to the address of the defendant, William Barnes, in the
115 city of New Orleans, in the State of Louisiana, a copy of this order or notice.

Witness my hand and seal of office, the 23d day of February, 1876.

[SEAL.] F. S. HEWES, *Clerk.*

Filed April 18th, 1876.
F. S. HEWES, *Clerk.*

And afterwards, to wit, at the October term, 1876, of the circuit court of Harrison county, Mississippi, among other orders and judgments then and there made, were two, in the words and figures following, to wit:

UNION NATIONAL BANK of New Orleans
vs.
WILLIAM BARNES. } 1,575. Attachment.

And it appears to the satisfaction of the court, that the writ of attachment has been returned unto court duly executed, and that the defendant could not be found in said county, and that defendant being a non-resident of the State of Mississippi, and affidavit having been filed in this cause stating
116 that the defendant, William Barnes, was a non-resident of the State of Mississippi, and that he resided, and was a citizen of the city of New Orleans, in the State of Louisiana, and that his post office address was at that place; in pursuance of said affidavit, publication was made in the Handsboro Democrat, a public newspaper printed and published in the town of Handsboro, in said county and State, stating the pendency of such attachment, at whose suit it was brought, in what court, when returnable, and what sum claimed; citing the defendant to be and appear before such court and to plead to this case, in default of which appearance judgment by default would be rendered and the property sold and the effects applied to plaintiff's claim, which notice of publication was published for four consecutive weeks, as required by law, said notice is herewith filed; and it appears to the satisfaction of the court that the clerk of this court forwarded by mail, postage paid, to
117 the address of the defendant, a true copy of said notice inserted in said newspaper, and filed affidavit of the fact, stating the time when, and the place where, such notice was forwarded, and the same is here filed with the papers, and the court is fully satisfied that due and legal publication was made in this case as required by law in such cases, and the said defendant having failed to appear and plead to this action, judgment by default is taken against said defendant for want of a plea. It is therefore considered by the court that said plaintiff do have and recover of and from this defendant the sum of five thousand one hundred and seven dollars and seventy-two cents for his debt, together with all costs and charges laid out and expended, to be taxed by the clerk of this court.

Judgment having been obtained by default upon proof of publication, it is further ordered by the court that the property
118 attached be condemned to be sold, and the effects applied to the payment of plaintiff's claim, and that a *venditioni exponas* issue, and that before any sale be made of the attached property, or execution issue against any garnishee, that plaintiff enter into bond, with security to be approved by the clerk in vacation, payable to the defendant in double the amount of the said judgment, as required by statute.

UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES, WILLIAM WALSH, Garnishee. } 1,575. Attachment.

This day came the plaintiff, by their attorney, and William Walsh, who having been duly summoned in this case as garnishee, was called, but failed to answer and made default. It is therefore considered by the court that the plaintiff, the Union National Bank of New Orleans, do have and recover of and from the said
119 William Walsh the sum of five thousand one hundred and seven dollars and seventy-two cents ($5,107.72), and their costs in this behalf expended.

Answer of J. D. Mayer & Co., Garnishee.

Circuit Court, October Term, A. D. 1876.

UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES.

Now comes J. D. Mayer, Frederick Mayer, and Henrietta Polydore, partners in Barnes Hotel, doing business under the firm name and style of J. D. Mayer & Co., for answer to the writ of attachment and garnishment served on them in the above case for answer say, that the process of garnishment in this case was personally served on each of them on the 23d day of November, 1874. They answer and say that on the second day of January, 1866, they made, executed, and delivered to William Barnes their certain promissory note in writing for the sum of seven thousand five hundred dollars to their own order and by them endorsed to said
120 William Barnes, said note made payable 2 years after date with interest at 6 per cent. per annum from date until maturity; and 10 per ct. from maturity until final payment. Said note was due Jan'y 2d, 1868, and that they have paid upon said note in the way of excess of interest and compound interest, and deducting their several amounts paid in this way leaves a balance on said note of about ($2,509$\frac{76}{100}$) and whatever is due is owing to William Barnes, as Barnes called upon them after the service of garnishment in this case, and claimed the interest upon said note referred to. They say that said promissory note is barred by the statute of limitation, and for that reason they do not owe the said W. Barnes or the holder of said note anything, and claims the benefit of the statute of limitation of 6 years as fully as though specially pleaded and interposed in this case, and that they had no effects of W. Barnes in their hands or possession at the time of the service of the
121 garnishment in this case or now, and they know of no other person or persons who are indebted to the said W. Barnes or of any one that have effects of said Barnes in their hands or possession.

Having fully answered, now prays to be hence dismissed with their reasonable costs and charges.

Oct. 24th.

J. D. MAYER,
C. F. MAYER,
H. POLYDORE.

STATE OF MISSISSIPPI, *Harrison County:*

Personally came and appeared before me, F. S. Hewes, clerk of the circuit court in and for said county and State, the above-named John D. Mayer, Frederick Mayer, and Henrietta Polydore, who, being duly sworn upon oath, each of them say that the matters and things set forth are true as therein stated.

Sworn to and subscribed before me on the 24th day of Oct., 1876.

F. S. HEWES, *Clerk.*

122 Filed Oct 25, 1876.
F. S. HEWES, *Clerk.*

Circuit Court, Harrison County, Mississippi. October Term, A. D. 1876.

Oct. 25th, 1876.

UNION NATIONAL BANK
vs.
WILLIAM BARNES and J. D. MAYER & Co., Garnishees. } 1,575. Attachment.

This day came on to be heard the answer of J. D. Mayer & Co., as garnishees, and the plaintiff declining to take issue upon or to reply to the same, submitted it to the court, who was of the opinion that said answer was sufficient to bar the plaintiff from recovering against said garnishees.

It is therefore considered by the court that said garnishees go hence without day, and recover of the plaintiff their reasonable costs.

Motion to set aside Judgment.

UNION NATIONAL BANK *vs.* WILLIAM BARNES.

123 It is moved the court that the judgment in this cause at a former day of this term be vacated and set aside for the following reasons:

1st. Because the judgment in said cause was rendered against the defendant upon proof of publication only, he being a non-resident of the State of Mississippi.

2d. Because there was no service of process on the defendant, and judgment on publication only cannot be rendered against a deceased

defendant, and in support of this motion the affidavit of Mrs. M. A. Davis, daughter of the defendant, is filed and exhibited as proof.

GEO. WOOD,
Amicus Curial for Motion.

Filed Oct. 26th, 1876.
F. S. HEWES, *Clerk.*

Affidavit.

Circuit Court, May Term, 1876.

STATE OF MISSISSIPPI, *Harrison County:*

124 UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES.

Before me, chancellor of the seventh chancery court district of the State of Mississippi, personally appeared Mrs. Martha A. Davis, who being by me first duly sworn, deposeth and saith that she is the daughter of the late William Barnes, the defendant in the above-stated case, and that the said William Barnes departed this life on the 4th day of May, A. D. 1875, in the city of New Orleans, State of Louisiana, where he then and had for a long time before resided.

M. A. DAVIS.

Sworn to and subscribed before me, George Wood, chancellor as aforesaid, this the 26th day of October, A. D. 1876.

GEO. WOOD, [SEAL.]
Chancellor.

Filed Oct. 26th, 1876.
F. S. HEWES, *Clerk.*

125 Circuit Court, Harrison County, Mississippi, October Term, A. D. 1876. October 27th, 1876.

UNION NATIONAL BANK
vs.
WILLIAM BARNES. } 1575. Attachment.

Comes on to be heard the motion of George Wood, *amicus curial*, to vacate and set aside the judgment rendered in this case on a former day of this term, because the said defendant was dead at the time of the publication of the notice of the pendency of the attachment in this cause. And it appearing to the satisfaction of the court, from the affidavit of Mrs. Martha A. Davis, that the defendant had departed this life before the publication of notice of the pendency of the attachment: It is therefore considered by the court that the judgment rendered at a former day of this term in this cause be vacated, set aside, and for naught held, and that the cause be continued until the next term.

126 *Scire Facias.*

THE STATE OF MISSISSIPPI, *Harrison County:*

Whereas the Union National Bank of New Orleans, a corporation domiciliated in the city of New Orleans, in the State of Louisiana, sued out a writ of attachment before one Thomas Bond, a justice of the peace in and for said county, on the 23d day of November, 1874, against William Barnes, for the sum of four thousand four hundred and fifty-six dollars and eighty-five cents, as a non-resident of the State of Mississippi, made returnable before the circuit court of said county and State, held at the court-house in said county and State, at Mississippi City, on the third Monday of April, 1875; and whereas the sheriff to whom the said writ of attachment was directed received the same in his office, and made a return upon said writ in the words and figures following, to wit:

127 Received the within in my office, Nov. 24th, 1874.

A. J. RAMSAY, *Sh'ff*

Executed the within process this day by levying upon the following described real estate: One lot or parcel of land, bounded south by property of J. D. Mayer & Co., west by property of L. L. Davis, north by township line between township 7 and 8, south of range 11 west, and east by property of Stephen Cullen and Mrs. Ross, containing twenty acres more or less, in section one, township 8 south, range 11 west, in said county of Harrison, State of Mississippi. Further executed by summoning J. D. Mayer, Fred. Mayer, and Henrietta Polydore, on the 24th day of November, 1874, and William Walsh on Dec. 13th, 1874, personally, and by delivering to them a true copy of this writ, 1874, to appear at next term of circuit court on return day of this attachment, to appear and answer, as garnishees, on oath, what they, or either of them, are in-

128 debted to said Wm. Barnes, or was at the time of the service of this writ, or what effects of said Barnes they, or either of them, had in their hands at the time of the service of this writ, or what effects or debts of said Barnes there are in the hands of any other persons to their knowledge or belief, the within-named William Barnes could not be found after diligent search and inquiry.

A. J. RAMSAY, *Sh'ff.*

And after the writ was returned into court executed, the defendant not found, it was suggested to the court, that since the service of the writ of attachment in this case, that William Barnes died intestate. It was among other things ordered that said case be revived in the name of the legal representatives of said decedent when known, and it having been suggested that W. G. Henderson has been appointed administrator of all and singular the goods and chattels, rights and credits, which were of William Barnes, dec'd. The sheriff of said county is hereby commanded to summon

129 the said W. G. Henderson, administrator of all and singular the goods and chattels, rights, credits, which were of William Barnes, dec'd, to be and personally appear before the circuit court of said county, to be held at the court house of said county, at Mississippi City, on the fourth Monday in April, 1877, to answer the complaint filed in this case and to be made defendant to this suit, so that this cause be revived and said cause revived against him, proceed to final judgment and execution, and have you then and there this writ.

Witness F. S. Hewes, clerk of the circuit court of said county and State, by his signature, and also the seal of said court, affixed at office in Mississippi City. Issued the 14th day of April, A. D. 1877.

[SEAL.] T. S. HEWES, *Clerk.*

Rec'd in my office April 14th, 1877.

A. J. RAMSAY, *Sheriff.*

Executed this process this day by handing to the wife of the
130 within named W. G. Henderson, administrator, of all and singular the goods and chattels, rights and credits, which were of William Barnes, dec'd, at his usual place of abode in said county, such person being then and there willing to receive the same, a true copy of this process, said W. G. Henderson not being found in my county after diligent search, this 16th day of April, 1877, and returned.

A. J. RAMSAY, *Sheriff.*

Plea.

The State of Mississippi, Harrison county. Circuit Court. April Term, 1877.

UNION NATIONAL BANK *vs.* WILLIAM BARNES.

Comes now William G. Henderson in his own proper person, who has been summoned on *sci. fa.*, as administrator of the estate of said defendant, to answer said complaint, and says that the plain-
131 tiffs ought not to have and maintain their action as mentioned and set forth in said complaint against said defendant; because he saith that there is not any record of the said supposed recovery in the said complaint mentioned remaining in the dsai fifth district court of the State of Louisiana, and city of New Orleans, as in said declaration alleged, and this the defendant is ready to verify; wherefore pray judgment, &c.

W. G. HENDERSON,
Administrator, &c., Defendant.

Filed April 25, 1877.

F. S. HEWES, *Cl'k.*

Replications.

Circuit Court, April Term, 1877.

THE STATE OF MISSISSIPPI, *Harrison County.*

UNION NATIONAL BANK *vs.* WILLIAM BARNES.

Now comes the plaintiff in said cause, by his attorneys,
132 Champlin & Henderson, and the defendant's plea of *nul tiel* record, as by him pleaded, says that there now exists in the fifth district court of the State of Louisiana, and city of New Orleans, a record of the recovery of judgment of the said plaintiff against said William Barnes, as in plaintiff's declaration alleged, and prays that this may be inquired into by the county.

CHAMPLIN & HENDERSON,
Atty's for Plaintiff.

Filed April 27th, 1877.
F. S. HEWES, *Clerk.*

UNION NATIONAL BANK OF NEW ORLEANS
vs.
W. F. HENDERSON, Adm'r, &c.

Now comes the said plaintiff, by their attorney, and for replication to defendant's plea of *nul tiel* record, says there is such a record, and this they are ready to verify by the record itself, which they pray the court to inspect, &c.

133 W. A. CHAMPLIN,
Att'y for Plaintiff.

Filed 23d October, 1877.
F. S. HEWES, *Clerk.*

And afterwards, to wit, at the October term, 1877, of the circuit court of Harrison county, Mississippi, being the 23d day of October, A. D. 1877, among other orders and judgments then and there made and recorded, were two in the following words and figures, to wit:

Judgment.

UNION NATIONAL BANK
vs.
W. G. HENDERSON, Administrator of the estate of William Barnes. } 1575.

This day this cause came before the court by consent of the parties, and the court being satisfied, after examining the record, it is considered by the court that the plaintiff do have, and recover of and from the defendant, W. G. Henderson, administrator of the estate of William Barnes, deceased, the sum of four
134 thousand two hundred and thirty-six $\frac{81}{100}$ dollars for this debt, and the sum of eleven hundred and seventy-two $\frac{53}{100}$ dollars,

for their damages and the costs of this suit, to be levied of the goods and chattels of said Barnes, in his hands to be administered, and the real estate attached in this case be condemned to be sold to satisfy the same, for which let a writ of *venditioni exponas* issue and that plaintiffs recover their costs, &c.

Judgment.

UNION NATIONAL BANK OF NEW ORLEANS
vs.
W. G. HENDERSON, Administrator of Estate of William Barnes, deceased. } 1575.

Judgment having this day been rendered against said defendant for the sum of five thousand four hundred and nine $\frac{34}{100}$ dollars and costs of suit, and it appearing that William Walsh was duly summoned to answer how much he is and was at the time in-
135 debted to said William Barnes, and whether he knew of other persons who was indebted to said Barnes, or had any goods or chattels in his or their hands belonging to said Barnes, and said Walsh having failed to answer as required by law. It is considered by the court that the said plaintiffs have and recover of and from the said Walsh the said sum of five thousand four hundred and nine $\frac{34}{100}$ dollars, ($5,409\frac{34}{100}$) for which let execution issue.

Motion to set aside Judgment.

UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES, WILLIAM WALSH, Garnishee.

Comes now William Walsh, the garnishee herein, and moves the court by his attorney, L. L. Davis, to set aside the judgment rendered against him at a former day of this term as garnishee herein for want of an answer, and now permit him to file his answer
136 as such garnishee for reason set forth in affidavit on file.

L. L. DAVIS,
For Motion.

Affidavit.

Circuit Court, October Term, 1877.

STATE OF MISSISSIPPI, *Harrison County:*

Personally came and appeared in open court William Walsh, who being duly sworn, deposeth and saith that a judgment was rendered against him as a garnishee at the suit of National Bank of New Orleans *vs.* William Barnes, for the sum of $——, and that he had no knowledge of any service on him which required him to answer in said suit that some time in 1874 a person handed him a paper just as he was entering to railroad cars to go to New Orleans, his place of residence, in which his name did not appear, and the person who

gave it him said Mr. Mayers requested him to do so, and
137 affiant supposed from the business arrangements between them that he, Mayers, wished affiant to know that he had been garnisheed in said suit, so that it would prevent them paying him, that affiant had no idea whatever that it was a notice to him as garnishee, that he, affiant, did not desire to avoid answer, or intended any contempt that affiant is not indebted to said Barnes, nor was not at the institution of this suit, nor does he know of any person that is so indebted; affiant further says that his attorney, Geo. Wood, Esq., is absent from this court without his knowledge or consent, who has been his counsel all the time, and affiant supposed he was in attendance, and affiant believes that if his counsel had been here he would have been informed. Affiant further says a gross injustice would be done him in enforcing this judgment, as he is not indebted to said Barnes in any amount.

WM. WALSH.

138 Sworn to and subscribed in open court, this 25th day of October, A. D. 1877.

F. S. HEWES, *Clerk.*

Filed Oct. 25, 1877.
F. S. HEWES, *Clerk.*

Circuit Court, October Term, A. D. 1877,

UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES, WILLIAM WALSH, Garnishee.

Comes on to be heard the motion of William Walsh, garnishee, to set aside the judgment rendered against him at a former day of this term, which motion being heard and understood by the court is sustained. It is therefore considered by the court that said judgment be and is hereby set aside, and leave granted the said Walsh to file his answer as such garnishee.

Answer. William Walsh, Garnishee.

139 Circuit Court, October Term, A. D. 1877.

UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES.

Now Comes William Walsh, for answer to the writ of attachment and garnishment served on him in the above case for answer, says that at the time of the serving out of said writ of attachment and garnishment he was not indebted to said W. Barnes in any amount whatever, nor has he been indebted to him in any amount since that time, and that he had no effects of said William Barnes in his hands or possession at the time of the service of the said garnishment in this case, or now or at any time since the service of said

garnishment and attachment, and he knows of no other person or persons who are indebted to the said William Barnes, or of any one that have effects of the said William Barnes in their hands or possession.

140 Having now fully answered, he prays to be hence dismissed with his reasonable costs.

WM. WALSH.

October 25th, 1877.

THE STATE OF MISSISSIPPI, *Harrison County:*

Personally came and appeared before me, F. S. Hewes, clerk of the circuit court in and for said county of Harrison, and State of Mississippi, the above-named William Walsh, who being by me duly sworn upon oath, says that the matters and things above set forth are true as therein stated.

Sworn and subscribed before me, this 25th day of October, 1877.

F. S. HEWES, *Clerk.*

Filed Oct. 25th, 1877.

F. S. HEWES, *Clerk.*

Circuit Court, October Term, A. D. 1877.

UNION NATIONAL BANK OF NEW ORLEANS
vs.
W. G. HENDERSON, Administrator, WILLIAM WALSH, Garnishee.

141 The plaintiff having alleged that William Walsh, the garnishee in this case, has not made a full and true discovery of the debts due by him to William Barnes, dec'd, in his lifetime, or the property in his possession belonging to decedent in his lifetime.

It is ordered by the court that plaintiff have sixty days to controvert the answer of the garnishee in writing, specifying in what particular he believes the answer to be untrue and cause continued.

Circuit Court, May Term, A. D. 1878.

UNION NATIONAL BANK
vs.
W. G. HENDERSON, Adm'r, WILLIAM WALSH, Garnishee. } 1575. This cause continued.

And afterwards, to wit, at the May term, A. D. 1879, of the circuit court of Harrison county, Mississippi, among other or-

142 ders and judgments, then and there made and recorded, was one in the words and figures following, to wit:

Order.

UNION NATIONAL BANK
vs.
W. G. HENDERSON, Adm'r., WM. WASLH, Garnishee. } 1575.

This day came the plaintiffs, and by consent this cause is dismissed, the costs in this case having been paid.

Bill of Exceptions.

UNION NATIONAL BANK OF NEW ORLEANS *vs.* WILLIAM BARNES.

This day came on to be heard the motion of George Wood, Esq., as *amicus curial*, to set aside the judgment in this case rendered on a former day of this term as per affidavit on file.

UNION NATIONAL BANK *vs.* WM. BARNES.

143 It is moved the court that the judgment rendered in this cause, at a former day of this term, be vacated and set aside for the following reasons:

1st. Because the judgment in said cause was rendered against the defendant upon proof of publication only, he being a non-resident of the State of Mississippi.

2d. Because there was no service of process on the defendant, and judgment on publication only cannot be rendered against a deceased defendant, and in support of this motion the affidavit of Mrs. M. A. Davis, daughter of the defendant, is filed and exhibited as proof.

GEORGE WOOD,
Amicus Curial for Motion.

Filed Oct. 26th, 1876.
F. S. HEWES, *Cl'k.*

Circuit Court. May Term 1876.

STATE OF MISSISSIPPI, *Harrison County*:

UNION NATIONAL BANK OF NEW ORLEANS
vs.
WILLIAM BARNES.

144 Before me chancellor of the seventh chancery court, district of the State of Mississippi, personally appeared Mrs. Martha A. Davis, who being by me first duly sworn, deposeth and saith that she is the daughter of the late William Barnes, the defendant in the above stated case, and that the said William Barnes departed this life on the 4th day of May, A. D. 1875, in the city of New Orleans, State of Louisiana where he then, and had for a long time before that time resided.

M. A. DAVIS.

Sworn to and subscribed before me, George Wood, chancellor as aforesaid, this the 26th day of October, A. D. 1876.

GEO. WOOD, *Chancellor.* [SEAL,]

Filed Oct. 26th, 1876.

F. S. HEWES, *Clerk.*

And introduced the record in the case to show when the suit was brought, and the proceedings thereon.

State of Louisiana, Fifth District Court for the Parish of Orleans.

145 UNION NATIONAL BANK OF NEW ORLEANS *vs.* WILLIAM BARNES & JNO. WILLIAMS & SONS. } No. 5780.

Petition. Filed May 15th, 1874.

To the Honorable the Judge of the fifth district court for the parish of Orleans :

The petition of the Union National Bank of New Orleans, a corporation domiciliated in New Orleans, respectfully shows, that William Barnes, John Williams, W. P. Williams, and F. M. Williams, composing the commercial firm of John Williams & Sons, domiciliated and doing business in New Orleans, and all the aforesaid parties residents of New Orleans are indebted *in solido* unto petitioner, in the sum of four thousand two hundred and thirty-six $\frac{81}{100}$ dollars ($4,236.81,) with interest at 8 per cent. from March 30th, 1874, until paid; $3.50 notarial fees and stamps and costs of suit for this, to wit :

146 That petitioner is the holder and owner of a certain promisory note made [at] New Orleans, Dec. 29, 1873, by the said William Barnes, payable ninety days after date, to the order of Jno. Williams & Sons, duly endorsed; that at the maturity thereof petitioner caused payment of the note to be duly demanded of the maker, and such payment was refused, and that petitioner caused the note to be duly protested for non-payment, and notice accordingly duly served upon the endorsers, and that the latter now refuse to pay the note, all of which will better appear by the note here referred to, which, as well as the accompanying protest and certificate of notice, are made part of this petition.

Whereupon petitioner prays that the said William Barnes and the commercial firm of Jno. Williams and Sons and the said Jno. Williams, W. P. Williams, and F. M. Williams, severally and

147 individually be duly cited to appear and answer this petition, and after regular proceedings had that petitioner do recover judgment *in solido* against the said William Barnes, Jno. Williams and W. P. and F. M. Williams for forty-two hundred and thirty-six $\frac{81}{100}$ (4,236.81) dollars, with interest at 8 per cent. per annum from March 30th, 1874, $350 notarial fees and costs of suit, and

petitioner prays for such further relief as equity, law, and the nature of the case may require.

(Signed) CARLETON HUNT, *Att'y.*

Answer. Filed June 6th, 1874.

UNION NAT'L BANK
vs.
WILLIAM BARNES. } No. 5780. 5th Dist. Court.

Now comes the defendant, William Barnes, who, for answer herein, respectfully says that he denies all and singular the allegations in plaintiff's petition contained, wherefore defendant prays to be hence dismissed with costs.

148 (Signed) T. WHARTON COLLINS, *Att'y.*

Judgment.

This cause came on this day for trial as to defendant, Wm. Barnes, and for the confirmation of the judgment by default herein entered against Jno. Williams & Sons, Carleton Hunt, for plaintiff. Defendants absent and not represented, when, after hearing pleadings and evidence, the court considering the law and evidence to be in favor of plaintiff, it is ordered, adjudged, and decreed that the judgment by default, herein entered on the 1st inst., be now confirmed and made final, and that there be judgment in favor of plaintiff, The Union National Bank of New Orleans, and against defendants, Wm. Barnes and John Williams & Sons, Jno. Williams, and W. P. Williams, and F. M. Williams, *in solido*, for the sum of forty-two
149 hundred and thirty-six $\frac{81}{100}$ dollars, with eight per cent. interest thereon from March 30th, 1874, until paid; three $\frac{50}{100}$ dollars, notarial fees, and cost of suit.

Judgment rendered June 22d, 1874, signed June 26, 1874.

(Signed) E. NORTH CULLOM, *Judge.*

I, Thomas Duffy, clerk of the fifth district court for the parish of Orleans, do hereby certify that the foregoing to be true and correct copies of the originals now on file in this office.

NEW ORLEANS, *Sept.* 24, 1874.

[SEAL.] THOMAS DUFFY, *Clerk.*

I, E. North Cullom, sole judge of the fifth district court for the parish of Orleans, do hereby certify that Thomas Duffy is the clerk of said court; that the same is a court of record, and that the signature, Thomas Duffy, clerk, to the foregoing certificate, is in the proper handwriting of him, the said Thomas Duffy, clerk,
150 to his official acts, as such, full faith and credit are due and owing, and I do further certify that his attestation is in due form of law.

Given under my hand, at the city of New Orleans, on the 21st day

of September, in the year of our Lord one thousand eight hundred and seventy-four.

E. NORTH CULLOM, *Judge.*

I, Thomas Duffy, clerk of the fifth district court, for the parish of Orleans, do hereby certify that E. North Collum, whose signature appears to the foregoing certificate, is now and was at the time of signing the same, sole judge of the fifth district court, for the parish of Orleans, duly elected and commissioned and qualified as such, and that said attestation is in due form of law.

Witness my hand and seal of said court, this 21st day of
151 September, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] THOMAS DUFFY, *Clerk.*

Filed Dec. 21st, 1874.

L. L. DAVIS, *Cl'k.*

And the court, after argument of counsel, being sufficiently advised in the premises, sustained said motion, and set aside said judgment in the words and figures following:

UNION NATIONAL BANK *vs.* WILLIAM BARNES. } 1575. Attachment.

Comes on to be heard the motion of George Wood, *amicus curial* to vacate and set aside the judgment rendered in this case on a former day of this term, because the said defendant was dead at the time of publication of notice of the pendency of the attachment in this cause; and it appearing to the satisfaction of the court from the affidavit of Mrs. Martha A. Davis that the defend-
152 ant had departed this life before the publication of notice of the pendency of the attachment, it is therefore considered by the court that the judgment rendered at a former day of this term in this cause be vacated, set aside, and for naught held, and that the cause be continued until the next term.

To which opinion of the court the plaintiff, by their counsel, objected and now objects and files this his bill of exceptions, and prays that the same may be allowed and signed, sealed, and made a part of the record, which is accordingly done.

JAMES S. HAMM,
Judge Cir. C't 7th Ind. Dis., Miss.

Filed Oct. 27th, 1876.

F. S. HEWES, *Cl'k.*

THE STATE OF MISSISSIPPI, *Harrison County,* } *ss:*

I, F. S. Hewes, clerk of the circuit court of said county, do hereby certify that the foregoing 52 pages and part of this contain
153 a true and perfect transcript of the original papers and pro-

ceedings filed and had in the cause therein stated as fully and completely as the same remain of record and on file in my office.

Given under my hand and official seal, this 22d day of June, 1880.

[SEAL.] F. S. HEWES, *Clerk.*

[Exhibit No. 2 to the answer of J. D. Mayer & Co. is in the words and figures following, to wit:]

154 $693.75. NEW ORLEANS, *May* 12, 1874.

On August 1st, after date, we promise to pay to the order of William Barnes, Esq'r, five hundred and ninety-three $\frac{75}{100}$ dollars, value received.

(Signature torn off.)

Due August 1st & 4.

Endorsed: William Barnes.

[And on the 19th day of August, A. D. 1880, the answer of the Union National Bank of New Orleans, to the bill of complaint, was filed and is in the words and figures following, to wit:]

155 In the Circuit Court of the United States, Southern District of Mississippi. May Term, 1880.

The separate answer of the Union National Bank of New Orleans to the bill of complaint of William Walsh, filed against it and other defendants, respondent answering states, that on the 22d day of June, 1874, the Union National Bank recovered a judgment against William Barnes, mentioned in complainant's bill, and other defendants, for the sum of $4,456.88, that it was found impossible, so far as the officers of the said bank knew, to make the amount of the judgment out of the defendants in Louisiana.

The said Barnes was in embarrased circumstances, apparantly insolvent, and as respondents believe and charge actually so.

He had been sued by his wife for a large sum, as respondents was informed, and by that means had covered all his property that was visible in Louisiana, and respondents having information

156 that he had property and debts due him in the State of Mississippi, sent their claim or a transcript of the said judgment to their attorney and agent at Mississippi City, with instructions to attach such debts and property as might be found there. That the proceeding commenced the 23d of November, 1874, by the issuance of the proper process, and a few days thereafter the process was served on John D. Mayer and Company, and on William Walsh, the complainant, and levied on certain real estate of little value.

That said J. D. Mayer & Co. appeared and answered, setting up that the debt claimed to be due from them to said Barnes was barred by the statute of limitations of six years, which alleged debt was the note sued on in this case and described in the complainant's bill; that said Walsh appeared and denied any indebtedness, or that he

had any effects in his hands belonging to said Barnes, or
157 that he knew any one who was so indebted, &c.

That among other matters alleged by the garnishees, John D. Mayer & Co., was, that if the said note was not in fact barred by the statute of limitations, there was due on it [$]2,509, the remainder having been paid by excessive interest charged and received; it was adjudged on hearing the application to be discharged on their answer by J. D. Mager & Co., that the said answer was sufficient in law.

Respondents obtained time to contest William Walsh's answer, further reciting what appears in the transcript referred to and filed by J. D. Mayer & Co., to their answer as Exhibit No. 1, the court had set aside the judgment by default taken against Barnes, the principal debtor, defendant, and to this action of the court, respondent's counsel had filed a bill of exceptions; matters being in that posture the whole matter was settled, and as respondents supposed, by the assent of and certainly without any objection on
158 the part of complainant, who was cognizant of the whole proceeding by the dismissal of the proceedings against complainant and allowing the case to stand without appeal as to the other parties, the said J. D. Mayer & Co. agreed to give their note for the balance unpaid on the said note, Exhibit A, to complainant's bill in consideration of extended time and a low rate of interest, and accordingly they, on the 24th of June, 1878, made their note payable four years after date and executed the mortgage mentioned and exhibited as (E) to complainant's bill. These arrangements were made by respondent's counsel and the answer is filed on information furnished by them, and on that afford by the answer of J. D. Mayer & Co., which respondents believe to be correct.

Respondents further answering, say that complainants, having counsel employed in these proceedings was fully cognizant
159 of them, and yet propounded no claim to the said note nor made any objection, nor gave any notice of intention to claim the same; and respondents gave up their proceedings and accepted the note and mortgage aforesaid in good faith, and the same remains valid and binding.

Respondents insist that said note, as it is *is* informed and believes, was at the time of their attachment proceeding, the property of said Barnes, that the alleged transfer to William Walsh, if ever made at all, was colorable and intended to evade the creditors of said Barnes, and on this point they accept the answer of J. D. Mayer & Co.

Respondents, as in their right, insist that the note of Jan'y 2, 1868, mentioned in complainant's bill, is and was barred by the statute of limitations when the complainant filed his said bill, and they rely upon the statute in this, their answer, as a protection against it.

160 And having fully answered, the respondent prays, &c., &c.

UNION NATIONAL BANK,
By W. P. HARRIS, *Sol'r.*

THE STATE OF LOUISIANA, *City of New Orleans:*

Personally appeared before the undersigned commissioner, of the circuit of the United States for the district of Louisiana, C. Kohn, who first being duly sworn on his oath, states that the above answer being filed on information which this affiant, the president of the Union National Bank, has obtained from information and sources therein given, and that he believes said information to be substantially true.

C. KOHN.

Sworn to before me, this 31st day of July, 1880.
[SEAL.] J. D. CRAWFORD,
Commissioner.

United States Circuit Court. District of Louisiana.

161 [And on the 19th day of August, A. D. 1880, the answer of respondents, Schmidt and Zeigler, was filed in this cause, and is in the words and figures following, to wit:]

162 In the Circuit Court of the United States, Southern District of Mississippi. May Term, 1880.

The joint answer of William B. Schmidt and Francis M. Zeigler, members composing the firm of Schmidt & Zeigler, of New Orleans, to the bill of complaint of William Walsh, filed against them and others, defendants in said court.

These respondents have no knowledge of the several transactions detailed in the said bill, as having occurred between the complainant and the defendants, John D. Mayer & Co. Respondents suppose that the deed of trust and note exhibited in said bill to be genuine, but do not know whether there is any sum of money legally due thereon, but on information and belief they deny that there is anything legally demandable on account thereof by the complainant, or any one.

163 Respondents having seen the answer of their co-defendants, John D. Mayer & Co., adopt the same as information on which they deny such liability, and they further insist that by the face of the said note Exhibit (A) to said bill, it is and was barred by the statute of limitations, and is not as against these respondents a subsisting and valid lien, and this respondent relies upon and asserts the defenses set up in said answer, both as to the limitation of six years, and, that whether the notes, principal note or interest notes, or both, are governed by the laws of Mississippi or those of Louisiana, though respondent insists as advised that those of Louisiana govern the contracts as to interest; that this respondent shall have the amount of usurious interest paid deducted

from the alleged debt, or treated as payment *pro tanto*, and respondent further insists that the interest notes are utterly void, that the deed of trust set forth the date of the maturity of the notes and at the time respondents took their mortgage on the Barnes
164 Hotel property as hereinafter stated, the deed of trust and notes secured by it had long been barred by the statute of limitations, and they plead the statute now against the assumption of any lien prior to that acquired by these respondents as hereinafter mentioned.

Respondents state that in 1876, to wit, on February 25th of that year, nearly ten years after giving of the notes mentioned in complainant's bill, and recited in said deed of trust, the said John D. Mayer & Co., to wit, February 25th, 1876, being indebted to the respondents in the sum of $6,330\frac{17}{100}$ for money and goods (supplies) furnished them, and wishing to obtain a further advance of 1,500 dollars, executed their three promissory notes, amounting in the aggregate to $7,720\frac{17}{100}$, payable in one, two, and three years, or, as the notes import, on the first day of October, 1877, 1878,
165 1879, the first for $2,500, the second for $2,500, and the third for $2,730, bearing 8 per cent. interest from date till paid, and to secure the same, and as part of the contract then made for extension of time and further advances as aforesaid, the said John D. Mayer & Co., by the names and seals of the individual parties, executed on the same day a deed of trust on the Barnes Hotel property, as set forth and described in the said complainant's bill, to secure the payment of the said three notes and the interest thereon, making Roderick Seal, one of the defendants, the trustee, and empowered, in case of default in paying the said notes as they fall due, to sell all the property and pay off all said notes with their legal interest, on the request of the holder of said notes, in writing—all of which will more clearly appear by reference to the said three notes attached to the said deed of trust, a certified copy of which latter, with the notes aforesaid, is prayed to be
166 taken as part of this answer as Exhibit No. 1.

Respondent further answering states, that no part of said notes, principal or interest, has been paid, and there is default on all of them; and respondents insist that, on every principle of law and justice, they are entitled to be preferred to the complainant on account of his delay in enforcing a claim on its face barred by lapse of time, and because said claim has no legal existence because barred by the statute of limitations of six years, and was so barred when the complainant filed his said bill; and further, that the note on which the said deed of trust was given, as set forth in the said bill, or such debt as was due thereon, was attached, as the said bill states, and as these respondents are informed by the answer and exhibit thereto, as a debt due said Barnes, who was the real owner at the time, and attachment took effect, of the debt; and the
167 garnishees said Mayer & Co. successfully defended and defeated the same because barred by the statute of limitations.

Respondents therefore insist that their deed of trust aforesaid, in any event, takes precedence of the said deed mentioned in the bill of the said complainant and relied on by him.

And having fully answered, &c., &c.

WILLIAM B. SCHMIDT,
FRANCIS ZEIGLER,
By W. P. HARRIS, *Sol'r.*

THE STATE OF LOUISIANA,
City of New Orleans:

Personally appeared before the undersigned, commissioner of the circuit court of the United States for the district of Louisiana, William B. Schmidt and Francis Zeigler, who being by me first duly sworn upon their respective oaths, state that the matters and things set forth in the foregoing answer, so far as stated to be of their own knowledge, are true, and so far stated to be on the information
168 of others they believe to be true.

W. B. SCHMIDT,
F. M. ZEIGLER.

Subscribed and sworn before me, July 30th, 1880.
[SEAL.] F. A. WOOLFLEY,
Commissioner United States Circuit Court,
District of Louisiana.

[Exhibit No. 1 to said answer of Schmidt and Zeigler, in the words and figures following, to wit:]

169 The indenture made and entered into in the 25[th] day of February, A. D. 1876, between John D. Mayer, Charles F. Mayer, and Henrietta Polydore, now citizens of Mississippi City, in the county of Harrison, in the State of Mississippi of the first part, and William B. Schmidt and Francis M. Zeigler, merchants, and doing business in the city of New Orleans, in the State of Lousiana, under the firm name and style of Schmidt & Zeigler of the second part, and Roderick Seal, of the county of Harrison, in the State of Mississippi, of the third part.

Witnesseth, that whereas the party of the first are indebted to the party of the second part in the sum of seven thousand seven hundred and thirty dollars and seventeen cents, $\$7{,}730\frac{17}{100}$, this sum includes the sum of fifteen hundred dollars for goods to be advanced to the party of the first part by the party of the second part,
170 by the month of June next, the party of the first part have made, executed, and delivered to the party of the second part their certain three promissory notes of even date with this instrument, two for the sum of two thousand and five hundred dollars each, payable as follows: the first is made payable on the first day of October, 1876, and the second made payable on the first day of October, 1877, and the third note is for the sum of two thousand seven hundred and thirty dollars and seventeen cents, $\$2{,}730\frac{17}{100}$,

and made payable on the first day of October, 1878, all of said notes bear interest at the rate of eight per centum per annum from date until paid, and the parties of the first part being willing to secure the payment of said promissory notes at maturity, for and in consideration of said indebtedness for the further consideration of the sum of one dollar to them in hand paid by the party of the second part do give, grant, bargain, sell, and deliver unto the
171 party of the third part, and to his heirs and assigns forever—

The following described real and personal property, to wit, First a certain tract of land situate in said county and State, at Mississippi City, known as Barnes Hotel, commencing at a stake on the shore of the Gulf of Mexico, which stake stands due south of the southwest corner of the hotel building, and running thence east (414,) four hundred and fourteen feet, more or less, along said Gulf shore to a street or road called Texas street, due north of the hotel wharf, and running thence north to the township line, between township 7 & 8, range 11 west, thence due west with the township line four hundred and fourteen (414) feet, more or less to a stake, thence south to the sea shore, and place of beginning, bounded south by the Gulf of Mexico or Mississippi sound, north by the township line, west by the property of Mrs. Martha A. Davis,
172 east by Texas street. Second, a tract of land adjoining the above, and known as the lot upon which stands the billiard and bar rooms of the hotel, and described as follows, viz., commencing at a stake on the shore, or Gulf of Mexico, on the east side of Texas street, and running thence along the Gulf shore east, three hundred and thirty-four (334) feet more or less to the southwest corner of a lot of land that formerly belonged to George Wegg, thence north with the line of said Wegg's lot about one eight[h] of a mile to the southeast corner of S. Callen's property, thence west with the line of said Callen's lot three hundred and thirty-four (334) feet more or less, to said Texas street, thence south with street to the place of beginning, bounded south by the Gulf of Mexico, north by Callen's property, west by Texas street, and east by the Wegg property, all in section one, township 8 south, of range
173 11 west, with all the furniture now in said premises, or that may be put on said premises hereafter, together with all, and singular, the lands, tenements, and hereditaments, thereto belonging, or in any way appertaining.

To have and to hold the above granted premises unto the said party of the third part, and to his heirs and assigns forever. This deed is made in trust and upon the terms and conditions following: That is to say, that if the party of the first part shall well and truly pay to the party of the second part the said three promissory notes as they fall due respectively, with all interest, then this trust is satisfied; but if the party of the first part shall fail or neglect to pay said promissory notes as they become due and payable, then the said party of the third part upon the

request of the party of the second part or their legal representatives, which request must be in writting, or by the holder of said
174 notes, proceed to sell all of said property or so much thereof as shall be necessary to pay off all of said notes, interest, and all costs that may be due at the time of the request so made, by advertising the same for the space of thirty days in five public places in said county, and for the same length of time in one or more newspapers, to be selected by the third party, the sale to take place on the premises and to be sold to the highest bidder for cash, or on a credit, as may be suggested by the party of the second part or their legal representatives, and on the payment of the purchase-money said party of the third part is to make, execute, and deliver to said purchaser or purchasers a deed in fee simple, and to put them in possession of said premises, and out of the proceeds of said sale the party of the third part is to pay off the principal and interest then due to the party of the second part or to their legal representatives, and all costs, &c., and the surplus, if any, is to be paid
175 over to the party of the first part or to their legal representatives.

In testimony whereof the party of the first part have hereto set their hands and affixed their seals on the 25th day of February, A. D. 1876.

J. D. MAYER. [SEAL.]
C. F. MAYER. [SEAL.]
HENRIETTA POLYDORE. [SEAL.]

THE STATE OF MISSISSIPPI, *Harrison County*, } *ss:*

Personally appeared before me, F. S. Hewes, clerk of the chancery court of the county of Harrison, the within-named J. D. Mayer, C. F. Mayer, and Henrietta Polydore, who acknowledged that they signed, sealed, and delivered the foregoing deed of trust on the day and year therein mentioned as their act and deed.

Given under my hand and seal of said court this 28th day of February, A. D. 1876.

[SEAL.] F. S. HEWES, *Clork.*

176 [Attached to said Exhibit "A" are three notes in the words and figures following, to wit:]

$2,500. MISS. CITY, *Feb'y 25th*, 1876.

On the first day of October next, we promise to pay to Messrs. Schmidt & Ziegler the sum of two thousand and five hundred dollars, for value received, with interest at the rate of 8 per cent. per annum, from date until paid. Secured by mortgage.

J. D. MAYER & CO.

$2,500. MISS. CITY, *Feb'y 25th*, 1876.

On the first day of October, 1877, we promise to pay to Messrs.

Schmidt & Ziegler the sum of two thousand and five hundred dollars, for value received, with 8 per cent. interest per annum, from date until paid. Secured by mortgage.

J. D. MAYER & CO.

177 $2,730.17. MISS CITY, *February 25th*, 1876.

On the first day of October, 1878, we promise to pay to Messrs. Schmidt & Ziegler the sum of two thousand seven hundred and thirty dollars and seventeen cents, for value received, with 8 per cent. interest per annum, from date until paid. Secured by mortgage.

J. D. MAYER & CO.

[And on the 28th day of August, A. D. 1880, complainant filed his replication to the answer of Schmidt & Zeigler, in the words and figures following, to wit:]

WILLIAM WALSH
vs.
J. D. MAYER & Co.

And the said complainant for replication to the answer of Schmidt & Zeigler, filed in the above cause, on the 19th day of
178 August, 1880, says that the matters and things set forth and alleged in the said answer, are not true nor sufficient to preclude complainant from obtaining the relief prayed in and by his original bill and amended bill in this cause, and that the matters and things stated and set forth in complainant's said bills, are true and sufficient to entitle complainant to the relief prayed in and by his said bills, and this complainant stands ready to aver, maintain, and prove as this court may direct, &c.

NUGENT & McWILLIE,
Sol's for Plaintiff.

[And on the said 28th day of August, A. D. 1880, the complainant filed his replication to the answer of the Union National Bank of New Orleans, in the words and figures following, to wit:]

179 In the Circuit Court of the United States for the Southern District of Mississippi. In Equity.

WM. WALSH, Complainant,
vs.
J. D. MAYER & Co. *et. als.*, Defendants. } 297.

And the said complainant, for replication to the answer of the Union National Bank of New Orleans filed in said cause on the 19th August, A. D. 1880, says: That the matters and things set forth and alleged in the said answer are not true, nor sufficient to preclude complainant from obtaining the relief prayed in and by his original and amended bill in this cause; and that the matters and things

stated and set forth in complainant's said bills are true and sufficient to entitle complainant to the relief prayed in and by his said bills, and this complainant stands ready to aver, maintain, and prove, as this court may direct.

NUGENT & McWILLIE,
Sols. for Complainant.

180 [And on said 28th day of August, A. D. 1880, the complainant filed his exceptions to the answer of J. D. Mayer & Co., in the words and figures following, to wit:]

181 In the Circuit Court of the United States for the Southern District of Mississippi. In Equity.

WILLIAM WALSH, Complainant,
vs.
J. D. MAYER & Co., Defendants. } 297.

And the said complainant, by solicitors, comes and says that the answer of the defendants, *J. D. Mayer & Co.*, filed herein on the 19th Aug., 1880, is impertinent in this, that on lines 24, 25, 26, 27, 28, and 29, page 11, and line 1 and 2, page 12 of said answer, the said respondents allege and state as follows: "Respondents answering, state that the said Barnes told them that he was the *bona fide* owner of the note after Walsh claimed it, and told them that said note was in his secretary, in his residence in the city of New Orleans, and that the said Walsh was not the owner of the said note, and that he did not intend to sell the said note, nor the interest notes falling due in 1874.

182 And for that, on lines 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, page 12 of said answer, said respondents say: "Respondent J. D. Mayer mentioned that complainant had written about the said note, but said Barnes said to respondent J. D. Mayer you, of course, understand how the thing really stands, and from this respondent understood him to mean that complainant's ownership was only nominal, Barnes cautioned respondent not to let it be known that they owed him anything.

Wherefore complainant prays the judgment of this honorable court in this behalf, and that the said parts of said answer be expunged for impertinency.

NUGENT & McWILLIE, *Sols.*

[And on the 13th day of October, A. D. 1880, the depositions of William Walsh and Mrs. Wm. Barnes, witnesses for complainant, were filed in said cause, in the words and figures following, to wit:]

183 In the Circuit Court of the United States for the Southern District of Mississippi, in Equity.

WILLIAM WALSH, Complainant,
vs.
J. D. MAYER & Co. *et als.*, Defendants. } 297.

Ints. to be propounded to William Walsh, witness for complainant, and to Mrs. William Barnes, witness for complainant, both being citizens of the State of Louisiana, residents of the city of New Orleans, whose answers thereto are to be read as evidence in behalf of complainant at the hearing of the above-entitled cause.

Ints. to William Walsh.

1. State your name, age and place of residence or business, and whether you are the complainant in the above-entitled cause.

2. Look on copy of note attached to this int., marked A, and state if you are the legal holder and owner of the original thereof; if so, please state when and where you became possessed of it, and on what consideration.

184 3. Please state whether or not you ever had any correspondence with defendants, J. D. Mayers & Co., or either of them in reference to said note referred to in int. 2, and if so, please file all letters received from said J. D. Mayers & Co., or either of them, touching said note, and copies of all letters written by you to them, or either of them, on the subject, marking the letters and copies so as to identify them.

4. Look on annexed account marked B, and state all you know about it whether correct or not; at whose instance, and by whom the sum of money therein stipulated was paid out and expended, for what purpose, and why; append all policies of fire insurance taken out by you on the Barnes Hotel property at Mississippi.

5. Please state whether or not said account was ever presented and shown to J. D. Mayer & Co., or either of them, for payment; if so, what they or either of them, said about it; whether it was acknowledged to be just and unpaid by them, and whether
185 the debt represented thereby was ever denied; state why said account was not paid.

6. State whether, at the time you acquired the note, copy whereof is attached to int. 2, you purchased any other notes from William Barnes now deceased; if so, give dates and amount, and when they became due, what you did with them, and when and how, if at all, the same was paid, and by whom; and how they were signed.

7. State whether at any time after your purchase thereof, the note for $7,500, due January 2, 1868, involved in this suit, was entrusted to Wm. Barnes; if so, when and for what purpose; how long it remained in the possession of said Barnes, and when it was by him entrusted to you.

8. Please state whether said Barnes or his estate has any interest in, or right and title to said note for $7,500.

9. Please state whether you ever had any interviews with J. D. Mayer of J. D. Mayer & Co., touching the insurance of the
186 Barnes Hotel property, and the said note for $7,500 herein sued for; if so, when; what was said by you, and what by them, or either of them; answer fully, and state whether they ever personally admitted the existence and validity of said $7,500 note as a debt due by them; and when and where.

10. Please state when you first learned of the intention and purpose on the part of J. D. Mayer & Co. to rely upon the statute of limitation as a bar to your recovery on said $7,500 note, and how you learned the fact, and where and under what circumstances.

11. State if you can upon what agreement, if any, the collection of the said $7,500 was deferred from time to time, by said Barnes, when and where said agreement was made, how it came to be made, and when the execution of said agreement ceased, and why. How long was said agreement to continue, and how long was it renewable, and what involved on the part of said Barnes as to the foreclosure of his mortgage.

12. Please state, if you can, how it happened that said
187 Barnes did not take steps, after the maturity of said note, to foreclose his mortgage. At whose instance and request? On what consideration, and whether or not the agreement and understanding between Barnes and J. D. Mayers & Co. involved delay of suit, and the payment of interest by defendant?

13. State anything else you may know that will be of benefit to either party to this suit.

[Copy note Exhibit A to int. 2 to William Walsh.]

$7,500. NEW ORLEANS, *January* 2, 1866.

Two years after date we promise to pay to the order of ourselves at ———, seven thousand five hundred dollars and no cents, for value received, with interest at the rate of six per cent. per annum from date, until maturity, and ten per cent. from maturity until final payment.

J. D. MAYER.
C. F. MAYER.
HENRIETTA POLYDORE.

Endorsed: J. D. Mayer, C. F. Mayer, Henrietta Polydore.

188 NEW ORLEANS, 1*st Sept.*, 1874.

Interest on the within note paid in full to date.
WM. BARNES.

NEW ORLEANS, *Jan'y* 2, 1868.

Interest on the within note paid in full to date.
WM. BARNES.

NEW ORLEANS, *Oct. 8th*, 1869.

Interest on the within note paid in full to date.

WM. BARNES.

NEW ORLEANS, *Oct. 8th*, 1869.

Interest on the within note is paid in full to date.

WM. BARNES.

Interest on the within note paid to 1st Sept., 1873.

WM. BARNES.

Exhibit "B," to 4th Int'y to Barnes.

JAMES B. MAYER & CO. TO WM. WALSH.

1875, *Feb'y* 15.

	To cash paid the Sun Mutual Insurance Co. of New Orleans for insurance on Barnes Hotel, Miss. City, $6,000 at 5½ per cent	$210 00
189	March 28. To cash paid Fireman's Insurance Co., New Orleans, for insurance on Barnes' hotel, Miss. City, $4,500, 3 per cent	135 00
		$345 00
	Less 15 per cent. rebate	51 75
		$293 25
	1876, March 28. To cash paid Fireman's Insurance Company, New Orleans, for insurance on Barnes' hotel, Miss. City, $6,000, for 6 mos., 1½ per cent.	90 00
		$383 25
	Interest to Dec. 1st, 1879, at 6 per cent.	103 37
		$486 62

NEW ORLEANS, *Dec.* 1st, 1879.

Interrogatories to Mrs. William Barnes.

1st. State your place of residence, and whether you are the widow of William Barnes, deceased.

2d. Examine copy of note attached to second int. to William Barnes, and state to whom the original of said note belongs; if to William Walsh state, if you know, when he became the owner of it.

190 3. State, if you can, why the collection of said note, at its maturity, was not pressed, and upon what agreement or understanding the collection of it was postponed; at whose instance and request, and why said agreement was made, and under what obligations William Barnes came or fell in respect to suing on said note and foreclosing his morgage on the Barnes hotel property.

4. Please state if you were present at any conversation in the city of New Orleans, La., about the date of the maturity of said note, or shortly thereafter, between William Barnes and J. D. Mayer touching the payment of said note; if so, state what brought said Mayer to New Orleans, what efforts, if any, were made by said Mayer to pay said note, and the result of said efforts, and what agreement was finally concluded on the subject between said Barnes and said Mayer, and for whom said Mayer was acting; please answer fully and how long said agreement was acted on by the parties.

191 5. State anything else you may know that will be of benefit or advantage to either party to this suit.

NUGENT & McWILLIE, *P. Q.*

Waiving commission and precedent formalities, we consent that this deposition on ints. and cross-ints. may be taken to any notary public or U. S. com'r resident in New Orleans, reserving only exceptions for competency, &c., of depositions when taken.

NUGENT & McWILLIE,
For Complainants.
W. P. HARRIS,
For Defendants.

192 *Cross-Interrogatories to William Walsh.*

1st. If in your answer to the 2d interrogatory in chief you say that you are the legal holder and owner of the note therein referred to, state whether you obtained it as a pledge for a debt due to you, or by an actual purchase; and if as a pledge what was the debt, and when contracted; and if by purchase the exact sum paid, and when paid.

2d. Was not William Barnes at the time you obtained the note insolvent to your knowledge, and was he not sued in several cases, and had not his wife sued him for separation of property on account of his pecuniary embarrassment.

3d. If in answer to the 6th interrogatory in chief you say you obtained other notes than that referred to as for $7,500. State when they were executed, their dates, the place payable, and whether they were payable to bearer, or to order, and to whom, and for what am't, and for what they were given. If you say for interest on the above note, state whether for interest past due, or to become

193 due.

4th. If in answer to the fourth interrogatory you state that the account therein spoken of for insurance money alleged to have been paid is correct; state whether or not it is the account in the main referred to in your letter to Henrietta Polydore of the 18th of Oct., 1875, and in your letter to J. D. Mayer & Co. of Oct. 2d, 1875, and whether you were not more urgent to have the property insured than anyone else, and whether you did not pay the insurance more on your own account than on any solicitation from J. D. Mayer & Co., and did you ever in person present the account.

5th. Were not you and Barnes well aware of the pendency of attachment proceedings by the Union National Bank, in the circuit court of Harrison county against William Barnes and against J. D. Mayer & Co., garnishees on the note for $7,500, when you paid premiums of insurance on the hotel property.

6th. Was not L. L. Davis, clerk of the said court, the son-in-law of Barnes, and had he not communicated privately the fact
194 of the pendency of such proceedings to Barnes soon after they were instituted, and were you not a party to these proceedings.

7th. In your bill filed in this case you say, speaking of the purchase of the Barnes Hotel property by J. D. Mayer & Co., and the giving of their notes—it was intended by him as an investment, and it was understood and agreed by and between them that if the purchasers were unable to meet the said notes—they were on payment of interest to secure indulgence so long as desired by them. Were you present at this agreement, and if so state precisely what was said at the time, and who said it.

8th. You further state in your said bill that about the 2d day of Jan'y, 1868, there was by Barnes an agreement to extend the time of payment of the note now held by your orator for one year, and thereafter should continue said extension and indulgence annually on certain conditions; state particularly whether you were present at the making of said agreement, and whether it was in
195 writing, what were its exact terms, if not in writing, what was said by the parties, and who were the parties.

9th. You further state in substance, that on that agreement the payment of the note was extended to October 8th, 1869, and then again extended to Oct. 8th, 1871, and then to Oct. 8th, 1872, and then to September 1, 1873, and then to Sept. 1, 1874. State particularly whether you were present at each of these extensions, and where they took place, and what was said and who said it.

10th. Was there but one agreement at the beginning, or were there annual agreements.

11th. You are asked in the 11th interrogatory about an agreement and what it "involved," as to the foreclosure of the mortgage by Barnes, and you are again asked in the 12th interrogatory about an agreement and whether it involved delay of suit. If you have answered there was an agreement outside of the note at any time, state when and where, and give its exact terms, and state
196 whether it was in writing or only verbal—not your opinion of what it was, but what it was.

12th. In what business were you engaged in June, 1874; were you a money lender, or a mere friend of Barnes, in the purchase of the note?

13th. Did you and Mr. Barnes see these interrogatories or copies of them, and did you confer together before answering them?

197 *Cross Interrogatories to Mrs. Wm. Barnes.*

1st. Where did Wm. Barnes reside in 1866, and at the time of his death.

2d. What were your reasons for sueing your husband for separation of property, and how much property was left to Barnes after your claim was satisfied, and in what did it consist; when did you begin suit against him?

3rd. If you state in answer to the 2d question-in-chief that William Walsh became owner of the note mentioned in that question, state how you came to know it.

4th. Did you not say to Mrs. Henrietta Polydore at the Barnes Hotel, in Mississippi City, in the fall of 1874, or early in 1875, that Wm. Walsh held the note for your benefit or for Barnes' benefit, and that Walsh was a friend to the family and the note was in safe hands, or words to that effect?

198 5th. Did not you and Barnes, one or both, importune and urge Henrietta Polydore and her brothers J. D. Mayer, and Charles F. Mayer, one or all of them, to put in an answer in the suit which was going on in Harrison county, Mississippi, at Miss. City, by attachment against Barnes and J. D. Mayer & Co., his debtors, confessing that they owed Barnes the whole amount of the note for $7,500.

6th. Was there not a paper drawn up for them, J. D. Mayer & Co., to sign, making confession of the whole debt in that suit, and were they not urged by you or by Barnes, or by both, to sign it?

7th. In the 3rd question you are asked about an agreement, and why Barnes did not collect the note in controversy. If you say you know of such agreement or of any reason for not collecting the note, state how you know the reason, state when the agreement was made, and who made it, and what it was, giving all its terms.

199 8th. Were not these questions both in chief and in cross-examination shown to you before you came before the commissioners; and if so, by whom shown to you, have you not arranged your answers beforehand?

Re-examination of Mrs. Barnes.

1. If you answer the 4th cross-int. "no" or "yes," please explain or detail the whole conversation fully, stating what was said by both parties, and all the circumstances fully?

2. If, in answer to 6th cross-int., you say there was such paper, state who drew it, when it was drawn up, what conversation was had about it, and all the circumstances?

3. State fully all the conversation that passed between you or your husband and said J. D. Mayer, his brother and sister?

NUGENT & McWILLIE, *P. Q.*

200 STATE OF LOUISIANA, *City of New Orleans.*

In accordance with the annexed written consent of counsel in the

cause pending and undetermined in the circuit court of the United States for the southern district of Mississippi, wherein William Wash is complainant and J. D. Mayer & Co. *et. als.* are defendants, to take the deposition of William Walsh and Mrs. William Barnes, resident of New Orleans, Louisiana, and witness on behalf of complainants, upon the annexed interrogatories and cross-interrogatories propounded to them in the above-entitled cause.

I, Andrew Hero, Jr., a notary public, in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and authorized under the laws of Louisiana to administer oaths, and to take and certify depositions, caused the aforesaid witnesses to come before me, separate and apart from each other, and on
201 this ninth day of October, A. D. eighteen hundred and eighty, having first duly and solemnly sworn said William Walsh, according to law, to testify the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy aforesaid, and to make true answers to the annexed interrogatories and cross-interrogatories, said William Walsh deposed, as follows:

To the first interrogatory said Walsh answered:

William Walsh, aged sixty-eight years, a resident of New Orleans, Louisiana, and am a retired merchant, I am such complainant.

To the second interrogatory said Walsh answered:

I have examined it; I am the legal holder and owner of the original note. In the month of June, eighteen hundred and
202 seventy-four, I purchased said note from William Barnes, of this city, now deceased, in the city of New Orleans, and paid him therefor in cash five thousand seven hundred and seventy-three $\frac{50}{100}$ dollars, and surrendered to him his note that I held of a thousand dollars and interest, making the total price of six thousand eight hundred dollars paid by me for the note.

To the third interrogatory said Walsh answered:

I did; Exhibit 1 is a copy of my letter to them of date of June 20th, 1874, and Exhibit No. 2 is their answer thereto; Exhibit 3 is a copy of a letter of Nov. 30th, 1874, to them, and Exhibit 4 is their answer; Exhibit 5 is a copy of my letter of 2d March, 1876, to them, and Exhibit 6 is their answer.

To the fourth interrogatory said Walsh answered:

I had; it is correct, just, and true; the sums of money
203 therein specified were paid me and expended by me at the instance and request and for account of defendants, J. D. Mayer & Co. for the purpose of protecting their property, and the above note due me thereon; Exhibits 5 to 11 inclusive are the correspondence had with them in reference to the insurance; I cannot attach the policies of insurance asked for because I have them not.

To the fifth interrogatory said Walsh answered:

Same was by me to J. D. Mayer in person as also mailed to them; they promised to pay it; J. D. Mayer in person, and Exhibit 10 contains Henrietta Polydore's statement, that she would send the

amount if she had it; the letters filed shows repeated acknowledgments of it, and that it was just and unpaid; neither ever denied the debt or account for insurance; they assigned as their reason for non payment a want of money and litigation that en-
204 joined them from making payment.

To the sixth interrogatory said Walsh answered:

I did; their amounts and maturities are specified in the above Exhibit 1, and also in Exhibit No. 12 hereto attached, in each of which letters I advised defendants of my ownership of these notes and desire to have them paid; I had them collected; they were paid at or about their respective maturities by defendants; they were both signed and executed by J. D. Mayer & Co.

To the seventh interrogatory said Walsh answered:

Only during my absence from New Orleans in the summer and fall of 1874, when he acted as my agent; so left with him, that if the two notes for interest and insurance were paid in my absence the proper credit could be made on the $7,500 note; he re-
205 turned it to me on my return to New Orleans in October, 1874, since which time I have always had it.

To the eighth interrogatory said Walsh answered:

None whatever.

To the ninth interrogatory said Walsh answered:

Yes, several. The first interview was on Dec., 1874, at his hotel in Mississippi City, when I saw not only him, but his brother and Mrs. Polydore, in reference to the debt. I went over to see them about the note and the insurance of the hotel. They told me that they had been garnisheed at a suit of the Union Bank against Mr. Barnes, and had been advised by their counsel not to pay the note or interest on it until the termination of the suit, and hence could not pay interest on the note, which they averred they would have paid for one quarter if not so enjoined or advised. They acknowledged their indebtedness on the note and a desire to arrange
206 it as soon as they could be freed from the pending litigation. As to insurance, they desired a delay as to reinsuring until the coming summer, which I declined to accede to, and they directed me to have it reinsured.

I was at Mississippi City again in January, 1875, and the same conversations were repeated, as also in June or July, 1875. At this last visit I gave J. D. Mayer the insurance account for $293.25, which he said he could not then pay, but would during the season, and spoke of his being still enjoined by the Union Bank suit from arranging as regards the note.

In the winter of 1876 I visited them in reference to the debt due me for the note and insurance, when I saw all three. To my demand for some arrangement of the debt thus due to me, they replied that the Bank suit was still pending, and the injunction or garnishment thereon issued still prevented a settlement of the debt, which they admitted to be due, and promised to pay to me
207 as soon as relieved from this litigation, which sought to have

Barnes and not me declared to be the owner of the note. I saw J. D. Mayer in the spring of 1876 at Mississippi City, when he stated that he had been informed that the note could not be collected of the makers because it was prescribed, but that this made no difference to him, as he would not avail himself of this plea; but that he would pay the note to whoever might be decided to be the legal owner of it upon the decision of the Bank suit, which was then still pending, but that he would claim a rebate on account of excessive interest that he had paid Barnes.

To the tenth interrogatory said Walsh answered:

In the spring of 1879 I heard in this city that they (J. D. Mayer & Co.) had filed an answer in this Union Bank suit, at Mississippi City, setting up this defense of limitation, and I immediately visited the court-house at Mississippi City and saw that such plea
208 had been filed by them; this visit was on 13th May, 1879. This is the first knowledge that I had, directly or indirectly, of limitation being set up by them, and never had any knowedge or information that they intended so to do.

To the eleventh interrogatory said Walsh answered:

Upon the agreement that by payment of interest from time to time the note should be extended. The custom had been between them to furnish notes for the interest, which, when paid, were a settlement of the interest for the year. The only fact I knew of such extension was that I was present when Barnes and J. D. Mayer met at Barnes' house, in New Orleans, and had an understanding in reference to it. Mayer had been attempting to borrow the money from others to pay off Barnes, but had been unsuccessful. He promised to give the notes for interest and premiums, which Barnes could realize on, and thus secured payment of
209 such interest and premiums in cash. Barnes said that if these notes for interest and premium were regularly paid, he would continue to carry the note as he had. This occurred in the winter of 1870. It was renewable year after year, and Barnes was not to foreclose as long as such interest and premium notes were paid. The notes alluded to in my letter, Exhibit 12, were for such interest and premiums for the year 1874, and were paid by the defendants in the fall of 1874. The acceptance of the interest involved in the obligation upon Barnes up to Sept., '74, not to foreclose on the note or mortgage, and I bought the note under this condition.

To the twelfth interrogatory said Walsh answered: *said*

Because the interest thereon was paid year after year by J. D. Mayer & Co. up to Sept. 1, 1874, and at their instance and request the note was extended, and Barnes abstained from fore-
210 closing the mortgage. The consideration was the payment of the interest from time to time. The agreement and understanding between them was that the debt should not be sued for or foreclosed on as long as the notes given each year for interest and premiums were met. This understanding was entered into,

in my presence, in the winter of 1879, as above related, and when I purchased the note in June, 1874, and received it with the small notes specified in exhibits. I was informed by Barnes that they were the interest and premiums, and given in accordance with this agreement of 1870, and before, and that the note could not be foreclosed on before Sept. 1, 1874, under his agreement with defendants.

To the thirteenth interrogatory said Walsh answered:

I cannot add anything else except to allude to my letter of March 2, 1876, wherein I speak of the amount due me on the $7,500 note, and the letter of defendants of March 9th, 1876, wherein they
211 admit the debt and say that the property is worth the amount due me. These letters are Exhibits Nos. 5 and 6 hereto.

To the first cross interrogatory, said Walsh answered:

By an actual purchase; six thousand eight hundred dollars; and paid about the end of June, A. D. 1874.

To the second cross-interrogatory said Walsh answered:

He was then insolvent; he was sued in several cases, and his wife had also sued him.

To the third cross-interrogatory said Walsh answered:

I do not recollect where they were executed or their dates, nor at what place made payable; they were drawn to the order of and endorsed by the makers, J. D. Mayer & Co., and amounts and maturities are given in exhibit. They were given for interest on the $7,500, and for premium paid of insurance on the property
212 upon which the note bear. They were given to meet the interest due up to September 1, 1874.

To the fourth cross-interrogatory said Walsh answered:

It is such account for $293.25 thereof, which had only accrued up to the dates of these letters, and in each of them it was this $293.25 of insurance, together with the debt of $7,500 and interest that I was writing of.

I may have been more urgent as I had the greater amount at risk. I paid the premiums because they had no money, as they stated, and at their request, and the Exhibits No. 5, 6 and 8 and 11 show their instructions and desire to have it insured. I presented the accrual for $293.25 in person.

To the fifth cross-interrogatory said Walsh answered.

Yes, I was; but I know not as to Barnes.

213 To the sixth cross-interrogatory said Walsh answered:

He was her son-in-law; I know not of what communications he may have made; I was not a party to such proceedings or suit.

To the seventh cross-interrogatory, said Walsh answered:

I was not present at such agreement at the time of purchase aforesaid, and knew of this from statements of Barnes and wife, but when J. D. Mayer & Co. had proven delinquents in payment of interest, I was present at such agreement to continue such arrange-

ment entered into in 1870, when J. D. Mayer admittted that such extensions had been made, and desired their continuance.

To the eighth cross-interrogatory, said Walsh answered:

I was not present, and only have such information in reference thereto, as is derived from statements of Barnes, and corroborated by admissions of J. D. Mayer in 1870, when he sought and
214 obtained an extension of the note and mortgage, at which I happened to be present.

To the ninth cross-interrogatory, said Walsh answered:

As I have above stated, I was only present at the verbal agreement had in relation thereto for its prolongation for the year expiring October, 1871, and at some of the others inquired of, J. D. Mayer, Mr. and Mrs. Barnes, and myself were present. At the interview had at Barnes' house in 1877. When this extension or renewal of the note and mortgage to 8 Oct., 1871, occurred, Barnes complained of Mayers' default, who stated that he had been attempting to raise money to pay off the debt, but had been unable, and desired a continuance of the extension that had been accorded by Barnes in the past years, promising to be more punctual in payments of interest, if the desired delay was granted.

Barnes acceded to his request and promised to carry the
215 note and mortgage up to the ensuing October of 1871, and continue the loan or debt, if defendants regularly paid the interest. J. D. Mayer & Co. furnished Barnes shortly afterwards the interest notes up to October, 1871, and upon their being paid, the credit of interest was made on the $7,500 note up to October, 1871.

The understanding was that the acceptance of the notes for interest by Barnes was an estoppel from his foreclosing on the debt up to the period on which interest was paid, and at this interview it was agreed to be extended to October of 1871. This is the only one of the various extensions or renewals that I have personal knowledge of the agreements had in reference thereto, and at this interview J. D. Mayer admitted that the extensions in the past had been a continuance of the debt and mortgage.

To the tenth cross-interrogatory said Walsh answered:

216 I understood that it was the one agreement at the beginning, and renewed from time to time by the action of defendants.

To the eleventh cross-interrogatory said Walsh answered:

I have stated all that I know in reference thereto, and that I only have personal knowledge of the occurrences in 1870, which extended the note to October, 1871. This was verbal, and the interest being paid or provided for by the defendants. Barnes agreed to carry the note up to October, 1871, and as they thus had extended the time of payment up to October of 1871, it was understood that he could not proceed against defendants or demand payment or enforcement of mortgage until the note again full due, which is the universal rule in all renewals.

To the twelfth cross-interrogatory said Walsh answered:

217 I was living off my money and investing it in whatever I thought judicious or lucrative. I bought the note as an investment, as it was extended up to the ensuing fall, and from knowledge of it anticipated that defendants would provide for its renewal. I was a friend of Barnes, but bought the note for an investment as a money-lender.

To the thirteenth cross-interrogatory said Walsh answered:

No, I have not, and am positive that she has not; as also, that we have not conferred with each other, and the notary declined to allow me to see any of the interrogatories before testifying, and then the succeeding questions was not read to me until I had answered the preceding one.

WM. WALSH.

And I, Andrew Hero, Jr., notary public as aforesaid, do further certify that the above and foregoing deposition of William
218 Walsh was taken down under oath as aforesaid, and reduced to writing by me in his presence; that his answers as above written were by me read over to and approved by him; and that thereupon the above answers were subscribed and sworn to by said witness William Walsh, before me, notary, at New Orleans, Louisiana, on this ninth day of October, A. D. 1880, as witness my hand and seal.

ANDREW HERO, JR., *Not. Pub.*

And on the eleventh day of October, A. D. 1880, the above-named Sarah Barnes, widow of William Barnes, having been by me, notary, first duly and solemnly sworn according to law, to testify the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy in the aforesaid suit, and to make true answers to the annexed interrogatories and cross-interrogatories, did thereupon under oath as aforesaid, depose and say as follows:

219 To the first interrogatory said Sarah Barnes answered:

New Orleans, Louisiana; I am his widow.

To the second interrogatory said Sarah Barnes answered:

I have examined it; it belongs to William Walsh of the city; he became the owner of it on June, 1874.

To the third interrogatory said Sarah Barnes answered:

Because they (J. D. Mayer & Co.) could not pay it, and they applied for time, which my husband, Wm. Barnes, gave them; I was present, and it was agreed that upon their paying interest, the note would not be carried, and that my husband would not sue on it; this agreement and extension was renewed in my presence three times in 1868, 1870 and 1873, at my residence in this city; this was done in each time at the request of J. D. Mayer, of J. D. Mayer & Co., because he said that they were unable to pay
220 the note, and would pay interest to have carried, and Mr. Barnes not to sue, and as an inducement to have Mr. Barnes do so, they paid a higher rate of interest than the note calls for;

Mr. Barnes bound himself to hold the note for the time interest was thus provided, without suing on it, or bothering the Mayers, and repeated this agreement as interest was paid.

To the fourth interrogatory said Sarah Barnes answered:

Yes, I was; I knew of the sale when made, through which my husband gave the note sued on, and another of like amount payable at one year; when the one year note fell due, the Mayers and Mrs. Polydore, could not pay it, nor was it paid when the two-year note fell due; they attempted to borrow money from others to pay off the whole debt, and had a broker employed to raise the money;

221 this they could not do, and J. D. Mayer then visited Mr. Barnes, at our residence in this city, and requested of him not to close them out, but to carry the notes longer without suing them, and that they would pay a higher rate of interest; Mr. Barnes acceded to his request, and in consideration of receiving the interest agreed to carry the notes; they gradually from time to time, paid up the first note, renewing as much of it as was unpaid, and all of the second note by paying Mr. Barnes interest in consideration of his carrying the debt, and not suing them; as Meyer would come to our house about these renewals, I happened to be present at those in 1868, 1870 and 1873, when I heard Mayer ask each time for Mr. Barnes to carry the debt without suing them, and that they would pay the interest; these interviews in 1872 and 1873, had only reference to the note owned by Mr. Walsh.

To the fifth interrogatory said Sarah Barnes answered:

222 I can call to mind of nothing else except that in 1870 and 1871, they failed to meet their interest, but again renewed it.

To the first cross-interrogatory said Sarah Barnes answered:

On Race street, New Orleans, La.

To the second cross-interrogatory said Sarah Barnes answered:

Because his affairs were embarrassed, and I wanted to protect my own funds. He had some property, but I do not recollect of what it consisted. I brought the suit in the fall of 1873.

To the third cross-interrogatory said Sarah Barnes answered:

Because my husband told me so at the time in the usual routine of conversation between husband and wife.

To the fourth cross-interrogatory said Sarah Barnes answered:

No; I never did.

223 To the fifth cross-interrogatory said Sarah Barnes answered:

No; but when I was there in 1876 Mrs. Polydore told me that she and Mayer had been notified that the note belonged to Walsh, by him, and that a paper had been sent them by L. L. Davis, asking them to sign and file, admitting that they owed the note. She read this paper to me, and I heard nothing about Barnes owing the note in it. She said that her lawyer, R. Seal, had advised them to sign nothing, and I said that as they owed the note to Walsh they ought not to hesitate to sign a paper acknowledging it. Had no talk with either of the Mayers, and this is all that took place.

To the sixth cross-interrogatory said Sarah Barnes answered:

Only the one that she told me of and read to me, which I understand to be as I have above stated; I did not read it, only heard what she read.

224 To the seventh cross-interrogatory said Sarah Barnes answered:

Because I was present and heard what Mayer and my husband said. I can recall to mind nothing more than what I have stated.

To the eighth cross-interrogatory said Sarah Barnes answered:

No, none of them, nor have I arranged any of my answers beforehand.

To first redirect cross-interrogatory said Sarah Barnes answered:

Have none to make, because I never had any such conversation.

The second redirect cross-interrogatory said Sarah Barnes answered:

She told me that L. L. Davis sent it to her, but beyond this and what I have above stated I know nothing more.

To the third redirect interrogatory said Sarah Barnes answered:

225 I have stated all that I recollect; I never was present at any others than those I have stated had by my husband and J. D. Mayer; never had any at all myself beyond these with others of the Mayers, and only once with Mrs. Polydore, after my husband's death, in reference to the debt herein sued for.

SARAH BARNES.

And I, Andrew Hero, Jr., notary public, as aforesaid, do further certify that the above and foregoing deposition of Sarah Barnes, widow of William Barnes, was taken down under oath, as aforesaid, and reduced to writing by me in her presence; that her answers, as above written, were by me read over to and approved by her; and that thereupon the above answers were above subscribed and sworn to by said witness, Sarah Barnes, before me, notary, at New Orleans, Louisiana, on this eleventh day of October, A. D. 1880.

As witness my hand and seal.

ANDREW HERO, JR.

226 EXHIBIT No. 1.—ANDREW HERO, JR., *Commissioner.*

J. D. MAYER & Co., *Mississippi City:*

I deem it proper to advise you that I have become the owner of a note given by the partners of your firm, Jan'y 2d, 1866, for seven thousand five hundred dollars, due in two years from date, and secured by deed of trust, for principal and interest, on the "Barnes Hotel" property, at Mississippi City.

I am also the owner of two notes, given by you for money paid for fire premiums on the above property, and for interest on the above note, for $7,500 for the current year; one note due August 1–4, 1874, for $693.75; and one note due Sept. 1–4, 1874, for $693.75.

The fire insurance policies have been transferred to me by the Factors' and Traders' Insurance Company of New Orleans, for $4,500, and the New Orleans Mutual Insurance Company of New Orleans, for $6,000.

227 Please acknowledge the receipt of this letter.

Yours, WM. WALSH.

NEW ORLEANS, *June 30th*, '74.

Mailed July 1, '74.

EXHIBIT 2.—ANDREW HERO, JR., *Commissioner*.

BARNES HOTEL, *July 6th*, '74.

Mr. WALSH,

DEAR SIR: Your letter received in referenee to your now being the holder of my notes; would have answered it before but have been busy.

Yours, J. D. MAYER.

EXHIBIT 3.—ANDREW HERO, JR., *Commissioner*.

NEW ORLEANS, *Nov. 30th*, 1874.

Messrs. J. D. MAYER & Co.,

Will any of the members of your firm be in the city soon? I wish to see some of you in relation to your note of $7,500, of which I am the owner. If you are not coming to the city I wish to

228 hear from you in relation to it. The interest is paid to the first of September last, but I need money, and I wish to know what you propose to do. The fire policy in the New Orleans Mutual Insurance Company expires Feb'y 8, 1875, and that in the Factors and Traders' Insurance Company expires March 27th, 1875. These must be provided for. Please let me hear from you without delay.

Yours, &c., WM. WALSH.

Mailed Dec. 1, 1874.

EXHIBIT 4.—ANDREW HERO, JR., *Commissioner*.

BARNES HOTEL, *Dec.* 8, '74.

Mr. W. WALSH.

DEAR SIR: Yours of late date is at hand. We are quite ready to pay three months' interest, and would rather pay it that way than to let it run until the amount gets so large, but we were served with the inclosed writ some few days ago with instructions, if we

229 paid anything now it was at our own risk until the case was decided; we of course do not want to run the risk of paying twice. The insurance, I want to have it changed, as we have made more chimneys within the last 3 years, and will have to get it described in policy. The time for paying the insurance comes at a bad time, and think we shall not reinsure until about June.

Yours respectfully,

J. D. MEYER & CO.

EXHIBIT 5.—ANDREW HERO, Jr., *Commissioner.*

NEW ORLEANS, *March* 2, 1876.

J. D. MAYER, *Miss. City:*

I have already called your attention to the expiration of the fire policy of the Sun Mutual Insurance Co. for $6,000 on your hotel, and will now say that I cannot agree with you in the wish you expressed when I saw you lately at Miss. City—to leave the whole property without any insurance until next summer.

230 I think it would not be wise for you or safe for me to leave things in that way. The amount you owe me on the $7,500 note is too large to be left in such an unprotected condition, and I cannot consent to it. When the policy in the Firemans' Office is out, I shall insist on a renewal, and, if necessary, I will advance the premium as before.

Yours respectfully, WM. WALSH.

EXHIBIT 6.—ANDREW HERO, Jr., *Commissioner.*

BARNES HOTEL, *March 9th*, '76.

Mr. WM. WALSH.

DEAR SIR: Yours at hand. We do not want to insure any until about July, then we expect to insure for about 15 thousand dollars. I think you will run no risk in that time, as the property would be worth the amount due you, if the building was to burn down.

Yours respectfully, J. D. MAYER & CO.

231 EXHIBIT 7.—ANDREW HERO, Jr., *Commissioner.*

NEW ORLEANS, *January 28th*, 1875.

J. D. MAYER & Co., *Miss. City:*

I have been trying to make arrangements about insurance on the hotel for the coming year. The old company, the N. O. Mutual, is not willing to renew. I can get the same amount, $6,000, at the Sun Mutual Company at 3½ per cent.; a rather high rate, but we must have some protection. In case of fire the insurance money would pay your debt, and you would own the property and could rebuild. I will advance the premium money and wait till next summer, when your business comes on, and then I think we can arrange with the insurance companies so as to have the premiums payable at times to suit you. As this transaction is with a new office, they want a description of the buildings, which you promised to

232 send me, but which has not come yet. Send me the sketch without delay, as the N. O. Mutual policy expires the 8th of Feb'y.

Yours, &c., WM. WALSH.

count of his firm, wanted to raise the money by mortgage of the property, or getting some one else to carry the Barnes note. I do not recollect the amount of the debt at this date, but it was a large sum.

I had parties who desired to have their funds invested on mortgage, and had frequent interviews with J. D. Mayer. At his request I visited the hotel, at Mississippi City, in the summer of 1869, so as to be able to state the condition and value of the property, and was then and there introduced to C. F. Mayer and Mrs. Henrietta Polydore, and examined the records at the court-house as regards their title to the property, upon my return to New Orleans, I had
240 several visits from J. D. Mayer, in reference to securing the loan, but I was unable to effect the transaction, owing to my principals being advised to lend no money in Mississippi, as it was always trouble to collect them.

To the third interrogatory said Seeskind answered and said:

The amount desired was to pay off, or take up an amount due Mr. Barnes, on account of what was owing to him in the Barnes Hotel, at Mississippi City, by J. D. Mayer & Co., but I do not recollect the sum. I accepted such employment, and made various efforts to secure the loan—said J. D. Mayer, many times that he is called on me in reference to it, I went so far as to visit Mississippi City, and then to examine property and records—but I was unable to secure them the loan. From the great length of time that has elapsed, I cannot give any more precise statement of what occurred, nor can I repeat conversation.

241 To the fourth interrogatory said Seeskind answered:

His object was to pay off the debt due by J. D. Mayer & Co. to Wm. Barnes on the hotel property at Mississippi City. All knew what was desired, because I saw all, and had conversation with J. D. Mayer and W. Barnes in reference to it I failed, because it was then impossible for me to have the capitalists, whom I represented, to loan on Mississippi property.

To the fifth interrogatory said Seeskind answered:

I did; and result was as above stated.

To the first cross-interrogatory said Seeskind answered:

I speak from memory.

To the second cross-interrogatory said Seeskind answered.

242 I know not; only recollect that it was desired to borrow a sum to pay off what J. D. Mayer & Co. owed Barnes on the hotel at Mississippi.

To the third cross-interrogatory said Seeskind answered:

I do not know.

S. A. SEESKIND.

And I, Andrew Hero, Jr., notary public as aforesaid, do further certify that the above and foregoing deposition, or answers, of Siegmand A. Seeskind were taken down under oath as aforesaid, and reduced to writing by me in his presence; that the answers of

said witness were by me read over to and approved by him, and that thereupon the aforesaid answers, or depositions, were subscribed and sworn to by said S. A. Seeskind before me, notary, at New Orleans, this twentieth day of October, A. D. 1880.

As witness my hand and seal.

ANDREW HERO, JR., *Not. Pub.*

243 In the Circuit Court of the United States for the Southern District of Mississippi. In Equity.

WILLIAM WALSH, Complainant,
vs.
JOHN D. MAYER & Co. *et als.*, Defendant. } 297.

Ints. to be propounded to Siegmand A. Seeskind, No. 115 Common street, a citizen of Louisiana, resident in New Orleans, whose answers are to be read as evidence, at the hearing on behalf of the complainants.

1. State your name, age, residence, and business. And if appraiser and real estate agent, state how long you have followed that business.

2. State if you know John D. Mayer, Charles F. Mayer, and Henrietta Polydore, consisting the firm of J. D. Mayer & Co., or either of them. If so, please state when you first became acquainted with either of them; where, when, and how often you meet
244 them, or either of them; for what purpose and at whose solicitation you met them, or either of them; whether William Barnes and John D. Mayer ever called together at your office in New Orleans, in the year 1868 and 1869, together or separately.

3. If you say that John D. Mayer called at your office to secure your services as real estate agent in order to secure a loan of $7,500 upon the Barnes Hotel property at Mississippi, in order to pay a note for that amount due William Barnes, please state whether you accepted such employment or not, what you did in consequence thereof, whether you visited Mississippi City or not, whether you inspected Barnes Hotel and other buildings, what conversations you had with John D. Mayer, Chas. F. Mayer, and Henrietta Polydore, or either of them, and the substance thereof, whether each of the members of the firm of J. D. Mayer & Co. were cognizant of your visit, and the purpose and objects thereof, and assented to your employment? Answer fully on this subject.

245 4. State, if you can, what was the main object of said J. D. Mayer & Co. in employing you, and whether they and said William Barnes were both aware of the character of the said object; and why the purpose and object of your employment failed; state all you know about the matter.

5. State whether prior to your visit to Mississippi City you made any efforts in New Orleans, Louisiana, to secure a loan for J. D. Mayer & Co. to pay the said $7,500 note, and the results to your efforts.

NUGENT & McWILLIE, *P. Q.*

Formalities and precedent delays waived, and consent given that the deposition of Siegmand A. Seeskind may be taken by and before A. Hero, Jr., notary public in New Orleans, La., upon the ints. and x-ints. hereto attached, reserving exceptions for competency legality, and relevancy alone.

NUGENT & McWILLIE,
For Complainants.

246 W. P. HARRIS,
For Defendants.

W. P. HARRIS.

Cross-interrogatories.

1. If you undertake in answer to the interrogatories-in-chief to give conversations between yourself, J. D. Mayer, and William Barnes, occurring nearly twelve years ago, state whether you made notes of the conversation at the time, or speak from memory.

2. When was the note referred to in the 5th interrogatory payable; what was its date and tenor?

3. What was William Barnes' pecuniary condition during 1874?

W. P. HARRIS.

[And on the 30th day of October, A. D. 1880, the deposition of Mrs. M. A. Davis, for complainant, was filed in said cause, and is in the words and figures following, to wit:]

247 In the Circuit Court of the United States for the Southern District of Mississippi. In Equity.

WILLIAM WALSH, Complainant
vs.
J. E. MAYER & Co. *et al.*, Defendants. } 297.

Ints. to be propounded to Mrs. Davis, a citizen of the State of Mississippi, resident at Mississippi City, whose answers thereto are to be read as evidence at the hearing, in behalf of the complainant.

1. State your name and place of residence, and whether you are the daughter of William Barnes, deceased, and are now over the age of twenty-one years.

2. State when you were married, to whom you were married, what office your husband held, and whether he is now deceased, and when he died, and whether he was an att'y-at-law or not.

3. State, if you recollect, whether or not your late husband
248 was ever entrusted with the collection of any notes given by J. D. Mayer & Co. to cover interest or provide for interest upon a note for $7,500 due January, 1868, and given by said Mayer & Co. to William Barnes, for the purchase of the Barnes Hotel property. If so, state if you can, during what years, and whether said interest notes were then held and owned by William Barnes or not, whether they were collected by your husband or not, and what was done with the proceeds thereof.

4. State, if you can, whether at any time William Barnes and J. D. Mayers had an interview in your house or yard in reference to the said $7,500 note or the interest thereon, or both. If so, whether you heard the conversation between them or not, what was said by each party, and during what year the conversation occurred. Give the substance of the conversation as far as you can now recollect it, and state what promise, if any, the said Mayers made, and what said William Barnes, and what arrangement said Barnes
249 made as to the extension of time for the payment of said note for $7,500.

5. State, if you recollect, whether at any time one Siegmand A. Seeskind, real estate agent, from New Orleans, or some broker, visited Mississippi City for the examination of the Barnes Hotel property and title thereto, and securing thereon a loan of money to pay the said $7,500 note. If so, state whether your late husband assisted him in any manner with reference to the matter; whether the effort to effect the loan was successful or not; and, if unsuccessful, what agreement as to extension of time of payment of said $7,500 was thereupon made by the said William Barness in his lifetime? State what you heard said Barnes say on the subject.

6. State any other matter which may be of benefit to either party to this suit.

NUGENT & McWILLIE, *P. Q.*

250 Precedent formalities and delays waived, and consent given that F. S. Hewes, chancery clerk at Mississippi City, may take the deposition of Mrs. Davis on annexed interrogatories and cross-interrogatories. Exceptions reserved for competency, relevancy, and legality only.

NUGENT & McWILLIE, *P. Q.*
W. P. HARRIS,
For Defendant.

251 *Cross-interrogatories.*

1st. If you speak of any notes for $7,500, or of interest notes, state whether you saw the notes, and give their date and tenor and amount and time of maturity.

2d. If you speak of hearing a conversation about a $7,500 note, state how long ago it was, and whether the conversation you speak of took place when S. A. Seeskind was present?

3d. Would you know the dates, amounts, and when the note or notes were due, but from questions 3 and 5 asked by the complainant; did you ever see the notes at all; if so, describe them?

4th. Is not all your information of the notes and their collection derived from your late husband, L. L. Davis? If not, state how much is, upon your actual personal knowledge.

5th. If you state that there was an agreement to extend
251½ time of payment of a $7,500 note, state what time was given, and the whole agreement, giving what each party to it said.

6th. Are you not a daughter of the late Wm. Barnes?

7th. Do you know of the suit brought by the Union National Bank of New Orleans against William Barnes, your father, in Harrison county, in which William Walsh and J. D. Mayer & Co. were summoned as garnishees? Did you or not make an affidavit in the case?

8th. Did not your husband keep William Walsh and William Barnes advised of what was being done in the case in court?

9th. Do you know whether William Barnes was sued by his wife, your mother, for a separation of property in 1873 or 1874, and the cause of the suit? Was not Wm. Barnes then much pressed with debts?

252 10th. Did you ever hear more than one conversation between Wm. Barnes and J. D. Mayers or other members of the firm of J. D. Mayers & Co.?

11th. State when the conversation took place and who were present.

12th. Do you know Wm. Walsh? Was he acting as a friend of the family of Barnes in what he did in reference to the Barnes Hotel notes and mortgages, or as a mere business man? Were not his and Barnes' relation very intimate?

W. P. HARRIS,
Sol'r for Def'ts.

253 In the Circuit Court of the United States for the Southern District of Miss.

WILLIAM WALSH, Compl't,
vs.
J. D. MAYERS & Co., Def'ts. } In Equity.

Pursuant to the annexed agreement, this day personally appeared before me, F. S. Hewes, clerk of the chancery court of Harrison county, Mississippi, Mrs. M. A. Davis, a witness herein named, summoned to testify in behalf of the complainant in a certain cause now pending and undetermined in the circuit court of the United States for the southern district of Mississippi, wherein William Walsh is complainant and J. D. Mayers & Co. are defendants. Said witness, being first duly sworn, deposes as follows, to wit:

Answer to 1st direct interrogatory:

My name is Martha A. Davis; residence at Mississippi City; I am the daughter of William Barnes, deceased; and I am over the age of twenty-one years.

Answer to 2d direct interrogatory:

I was married 23 years ago the 21st day of last December; I was married to L. L. Davis, clerk of the circuit and chancery courts of Harrison co., Mississippi. He is now deceased; he died on
254 the 11th day of February, 1880. He was an attorney-at-law.

Answer to 3d direct interrogatory:

He was intrusted with the collection of interest notes of J. D.

Mayer & Co., given to cover the interest upon a note for $7,500, due January, 1868, given by said Mayers & Co. to William Barnes for the purchase of the Barnes Hotel property. I cannot state positively in what year, but I think it was about seven or eight years ago; the notes were not held and owned by William Barnes, they were collected by my husband, and the proceeds were sent to Stoddard Howell, who had purchased them. My husband collected the interest notes two years in succession for Howell.

Answer to 4th direct interrogatory:

They held an interview, but not in my house or yard, but within 50 feet of my house or yard, in reference to the note of $7,500, and interest thereon. I heard the conversation between them. My father said he wanted his money, both principal and interest, that he would wait no longer for it.

255 Mr. Mayer told my father to see when he went back to the city of New Orleans what he could [do] about raising the money for him, that he, Mayer, could not raise it. It was at the time that my father, on his return to the city, sent Wm. Seeskind, the broker, to see if he could negotiate with Mayer, and let him have the money to take the notes up.

The conversation occurred 7 or 8 years ago, in the summer. I do not recollect the exact year, but I think it was in the month of June. Mayer made no promises, but made the request, as stated to my father. My father had no promises to make, and made none. My father made no agreement as to the extension of time for the payment of said note for $7,500.

Answer to 5th direct interrogatory:

The said S. A. Seeskind came with a letter of introduction to Mr. Davis, and Mr. Davis came with him to the clerk's office and examined the records and judgments against the Mayers, and Mr.

256 Seeskind remarked when he came back with Mr. Davis that he would not touch the whole concern with a forty-foot pole, let alone raising money on it, that he thought it was rotten to the core.

The effort to effect the loan was unsuccessful; I do not know of any extension for the time of the payment of the $7,500 having been made by my father, never heard of it, and do not think that any was ever made.

Answer to 6th direct interrogatory:

I do not know of anything else.

M. A. DAVIS.

Sworn and subscribed before me, this 25th Oct., 1880.

F. S. HEWES, *Clerk.*

And to the cross-interrogatories hereto annexed the said witness, sworn as aforesaid, deposes as follows, to wit:

Answer to 1st cross-interrogatories:

I saw the principal note for $7,500, but do not recollect the exact

date or tenor; I saw the interest notes collected by Mr. Davis, but the date or amount of them I do not recollect.

Answer to 2d cross-interrogatory:

The conversation took place 7 or 8 years ago; Mr. S. A. Seeskind was not present.

Answer to 3d cross-interrogatory:

I would have recollected the date and amount of the note
257 for $7,500 and when due without the questions contained in direct interrogatories 3 and 5, but, as I have stated, I do not recollect date or amount of interest notes, but I have seen the note for $7,500 and the interest notes collected by my husband.

Answer to 4th cross-interrogatory:

Not entirely. As to my personal knowledge, my father informed me of the matters stated. I took the proceeds of the collection of the first interest notes to Mr. Howell myself. I heard the conversation between Mr. Davis and Mr. Seeskind, when Mr. S. informed Mr. Davis of his business and the conversation between them when they returned from the office after making examinations of records, &c.

Answer to 5th cross-interrogatory:

There was no agreement to extend the time to my knowledge.

Answer to 6th cross-interrogatory:

I am.

Answer to 7th cross interrogatory:

I know that such a suit was brought; I do not know whether William Walsh and J. D. Mayers & Co. were summoned as garnishees or not; I did make an affidavit in the case.

258 Answer to 8th cross-interrogatory:

I think not; he was not employed in the case—had nothing to do with it until after my father's death, and then in the absence of Mr. Geo. Wood, his att'y, he protected Mr. Walsh on one occasion.

Answer to 9th cross-interrogatory:

I do not know of my own personal knowledge that such a suit was brought; I have been so informed; I do not know the cause; William Barnes was not much pressed with debts that I know of.

Answer to 10th cross-interrogatory:

I never heard but the one conversation as stated.

Answer to 11th cross-interrogatory:

The conversation of which I have testified took place about 50 feet from my house; there was no one present but J. D. Mayer and my father; I was standing on the gallery of my house; they were very much excited, and I heard the whole of the conversation.

Answer to 12th cross-interrogatory:

I do know Wm. Walsh from my earliest recollection; he
259 was acting in his interest, as my father sold him the note for $7,500; they were friends from boyhood and were intimate.

M. A. DAVIS.

Sworn to and subscribed before me, this 25th Oct., 1880.

F. S. HEWES, *Clerk.*

I, F. S. Hewes, clerk of the chancery court of Harrison county, Mississippi, do hereby certify that Martha A. Davis, the witness named in the annexed interrogatories, appeared before me this day and testified as before stated, which deposition contained in the foregoing six pages, being by me taken down in my own handwriting and being read over to said witness, was by her approved, sworn to and subscribed, all which I enclose and direct to the clerk of the circuit court of the United States for the southern district of Mississippi, at Jackson, Mississippi.

Given under my hand and official seal at Mississippi City, this 25th October, A. D. 1880.

[SEAL.] F. S. HEWES, *Clerk.*

Fee for deposition, $2.50, paid by William Walsh.

F. S. HEWES, *Clerk.*

260 [And on the 10th day of November, A. D. 1880, the following certificate was filed in said cause by complainant, to wit:]

261 THE STATE OF MISSISSIPPI, *Harrison County:*

I, F. S. Hewes, clerk of the chancery court of said county and State, [—] that there is no entry of satisfaction on the margin of the record of a deed of trust, dated the 20th day of February, 1866, from J. D. Mayer, C. F. Mayer, and Henrietta Polydore to R. Seal, trustee, and recorded in record of deeds of said county, book No. 10, pages 45 and 6, to secure a loan of $15,000 for the term of one and two years from Wm. Barnes to said John D. Mayer, Charles F. Mayer, and Henrietta Polydore, for which they "have made their two certain promissory notes for the sum of $7,500 each, both dated January 2d, 1866, drawn to their own order and by them endorsed and payable as above set forth, with interest at the rate of six per cent. per annum from date until maturity, and if not then paid, ten per cent. per annum from maturity until final payment."

262 Said deed of trust conveying 1 lot of land in Harrison county, Miss., known as Barnes Hotel, and 1 lot known as the lot upon which is situated the billiard rooms of Barnes Hotel, said deed of trust having been recorded on the 15th day of June, A. D. 1866, as the same appears of record in my office.

Given under my hand and official seal, at Mississippi City, this 25th Oct., 1880.

[SEAL.] F. S. HEWES, *Clerk.*

[And on the 11th day of November, A. D. 1880, an interlocutory decree was made and entered of record in said cause, in the words and figures following, to wit:]

WILLIAM WALSH
vs.
J. D. MAYER & Co. *et al.* } 297.

This day came complainant and withdrew exceptions heretofore filed to the answer of J. D. Mayer & Co., and thereupon,
263 by consent of parties, it is ordered, adjudged, and decreed that complainant file replication to said answer as of the 28th August, 1880, and under the former decree of this cause, without prejudice to his right at the hearing to insist upon the matter so excepted to as presenting no defense to defendants' bill; and it is further ordered, adjudged, and decreed that said replication, when filed, be considered and treated as if filed at the last term of this court.

And thereupon said replication was filed, and it is further ordered that defendants, Smith & Ziegler, have leave to insert in first line of second page of their answer the amendment this day filed, and that the replications filed in the cause extend and apply to said amendment.

Ordered, adjudged, and decreed, this 11th Nov., 1880.

R. A. HILL, *Judge.*

264 [And on said 11th November, A. D. 1880, complainant filed his replication to the answer of J. D. Mayer & Co., in the words and figures following, to wit:]

WILLIAM WALSH, Complainant, *vs.* J. D. MAYER & Co. *et al.*, Defendants.

And the said complainant for replication to the answer of J. D. Mayer & Co., herein filed on the 19th day of August, A. D. 1880, says:

That the matters and things set forth and alleged in the said answer are not true nor sufficient to preclude the complainant from obtaining the relief prayed in and by his original and amended bills in this cause, and that the matters and things set forth in complainant's said bill are true and sufficient to entitle complainant to the relief prayed in and by his said bills, and this complainant stands ready to aver, maintain, and prove, as this court may direct.

NUGENT & McWILLIE, *P. Q.*

265 [And on the 12th day of November, A. D. 1880, the complainant, by consent of defendant, filed in said cause as proof a policy of insurance, in the words and figures following, to wit:]

266 *The Sun Mutual Insurance Company of New Orleans.*

[On the margin:] No. 12970. Sum insured, $6,000. Rate, 3½ per cent. Premium, $210.

By this policy of insurance, in consideration of two hundred and

ten dollars, to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure ac. whom it may concern, as interest may appear, against loss or damage by fire, to the amount of six thousand dollars:

On the frame shingled west wing of Barnes Hotel, marked X on diagram furnished, situated at Mississippi City, Harrison county, Miss., $3,000.

On kitchen and servant's rooms, running in rear thereof, and marked X on diagram, including office, $1,000.

On furniture contained in said buildings, $2,000; subject to ¾ cc. Loss, if any, payable to Wm. Walsh, mortgage to extent of $7,500 *pro rata* with Factors & Traders' Ins. Co.'s policy on center
267 building and furniture, marked F and T on diagram, and balance to J. D. Mayer & Co., proprietors, one year. And the said company do hereby promise and agree to make good unto the said insured, their executors, administrators, and assigns, all such loss or damage that may happen by fire to the property hereby insured, not exceeding in amount the sum insured, as specified during one year, to wit: from the fifteenth day of February one thousand eight hundred and seventy-five, (at 12 o'clock at noon,) unto the 15th day of February, one thousand eight hundred and seventy-six, (at 12 o'clock at noon,) the said loss or damage to be paid within sixty days after proof and adjustment thereof may by the insured, in conformity to the conditions annexed to this policy; provided always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage by fire, which may happen or take place by means of an invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane.

268 And provided further, That in case the insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and if the said insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior to or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured, shall bear to the whole amount insured on said property.

269 And it is agreed and declared to be the true intent and meaning of the parties hereto that in case the above-mentioned property or premises, or any part thereof, shall at any time after the making, and during the time this policy would otherwise continue in force, be appropriated, applied, or used to or for the pur-

WILLIAM WALSH
vs. } 297.
J. D. MAYER & Co. *et al.*

This day came complainant and withdrew exceptions heretofore filed to the answer of J. D. Mayer & Co., and thereupon,
263 by consent of parties, it is ordered, adjudged, and decreed that complainant file replication to said answer as of the 28th August, 1880, and under the former decree of this cause, without prejudice to his right at the hearing to insist upon the matter so excepted to as presenting no defense to defendants' bill; and it is further ordered, adjudged, and decreed that said replication, when filed, be considered and treated as if filed at the last term of this court.

And thereupon said replication was filed, and it is further ordered that defendants, Smith & Ziegler, have leave to insert in first line of second page of their answer the amendment this day filed, and that the replications filed in the cause extend and apply to said amendment.

Ordered, adjudged, and decreed, this 11th Nov., 1880.

R. A. HILL, *Judge.*

264 [And on said 11th November, A. D. 1880, complainant filed his replication to the answer of J. D. Mayer & Co., in the words and figures following, to wit:]

WILLIAM WALSH, Complainant, *vs.* J. D. MAYER & Co. *et al.*, Defendants.

And the said complainant for replication to the answer of J. D. Mayer & Co., herein filed on the 19th day of August, A. D. 1880, says:

That the matters and things set forth and alleged in the said answer are not true nor sufficient to preclude the complainant from obtaining the relief prayed in and by his original and amended bills in this cause, and that the matters and things set forth in complainant's said bill are true and sufficient to entitle complainant to the relief prayed in and by his said bills, and this complainant stands ready to aver, maintain, and prove, as this court may direct.

NUGENT & McWILLIE, *P. Q.*

265 [And on the 12th day of November, A. D. 1880, the complainant, by consent of defendant, filed in said cause as proof a policy of insurance, in the words and figures following, to wit:]

266 *The Sun Mutual Insurance Company of New Orleans.*

[On the margin:] No. 12970. Sum insured, $6,000. Rate, 3½ per cent. Premium, $210.

By this policy of insurance, in consideration of two hundred and

ten dollars, to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure ac. whom it may concern, as interest may appear, against loss or damage by fire, to the amount of six thousand dollars:

On the frame shingled west wing of Barnes Hotel, marked X on diagram furnished, situated at Mississippi City, Harrison county, Miss., $3,000.

On kitchen and servant's rooms, running in rear thereof, and marked X on diagram, including office, $1,000.

On furniture contained in said buildings, $2,000; subject to ¾ cc. Loss, if any, payable to Wm. Walsh, mortgage to extent of $7,500 *pro rata* with Factors & Traders' Ins. Co.'s policy on center
267 building and furniture, marked F and T on diagram, and balance to J. D. Mayer & Co., proprietors, one year. And the said company do hereby promise and agree to make good unto the said insured, their executors, administrators, and assigns, all such loss or damage that may happen by fire to the property hereby insured, not exceeding in amount the sum insured, as specified during one year, to wit: from the fifteenth day of February one thousand eight hundred and seventy-five, (at 12 o'clock at noon,) unto the 15th day of February, one thousand eight hundred and seventy-six, (at 12 o'clock at noon,) the said loss or damage to be paid within sixty days after proof and adjustment thereof may by the insured, in conformity to the conditions annexed to this policy; provided always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage by fire, which may happen or take place by means of an invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane.

268 And provided further, That in case the insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and if the said insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior to or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured, shall bear to the whole amount insured on said property.

269 And it is agreed and declared to be the true intent and meaning of the parties hereto that in case the above-mentioned property or premises, or any part thereof, shall at any time after the making, and during the time this policy would otherwise continue in force, be appropriated, applied, or used to or for the pur-

forth, so long as the same shall be so appropriated, applied, or used, these presence shall cease and be of no force or effect.

And it is moreover declared, that this insurance is not intended to apply to or cover any books of accounts, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes or other evidences of debt, nor to money or bullion; and that this policy is made and accepted in reference to the terms and conditions hereunto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for.

The interest of the insured in this policy is not assignable unless by consent of this corporation, manifested in writing by endorsement hereon, and in case of any transfer, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect.

281 The payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, all sums owing to the company by the assured, whether by unmatured notes, book accounts, or otherwise, being first deducted.

In witness whereof, the Factors and Traders' Insurance Company of New Orleans have caused these presents to be signed by their president or vice-president, and attested by their secretary, at their office in the city of New Orleans, this twenty-seventh day of March, 1868.

H. DOAM, *Vice-President.* [SEAL.]

ED. A. PALFREY, *Secretary.*

[Attached to said policy are the following notes, to wit:]

Sum insured, $4,500. Renewal, No. 2386.

The Factors and Traders' Insurance Company of New Orleans.

MARCH 27TH, 1874.

In consideration of one hundred and twelve $\frac{50}{100}$ dollars
282 paid by William Barnes, being premium on forty-five hundred dollars, insured under special fire policy No. 771, the same is hereby continued in full force for the term of one year, viz., from the twenty-seventh day of March, 1874, at noon, until the twenty-seventy day of March, 1875, at noon.

H. DOAM, *President.*

ED. A. PALFREY, *Secretary.*

SUM INSURED, $4,500. RENEWAL, No. 880.

The Factors and Traders' Insurance Company of New Orleans, in consideration of one hundred and twelve $\frac{50}{100}$ dollars, paid by William Barnes, being premium on forty-five hundred dollars, insured under special fire policy No. 771, the sum is hereby continued in full force for the term of one year, viz: from the twenty-seventh

day of March, 1871, at noon, until the twenty-seventh day of March, 1872, at noon.

NEW ORLEANS, *March* 29, 1871.

H. DOAM, *President.*

ED. A. PALFREY, *Secretary.*

283 SUM INSURED, $4,500. RENEWAL' No. 550.

The Factors and Traders' Insurance Company of New Orleans, in consideration of one hundred and twelve $\frac{50}{100}$ dollars, paid by William Barnes, being premium on forty-five hundred dollars, insured under special fire policy No. 771, the same is hereby continued in full force for the term of one year, viz: from the twenty-seventh day of March, 1870, at noon, until the twenty-seventh day of March, 1871, at noon.

NEW ORLEANS, *March* 26, 1870.

H. DOAM, *President.*

ED. A. PALFREY, *Secretary.*

SUM INSURED, $4,500. RENEWAL, No. 315.

The Factors and Traders' Insurance Company of New Orleans, in consideration of one hundred and twelve $\frac{50}{100}$ dollars, paid by William Barnes, being premium on forty-five hundred dollars, insured under special fire policy No. 771, the same is hereby continued in full force for the term of one year, viz., from
284 the twenty-seventh day of March, 1869, at noon, until the twenty-seventh day of March, 1870, at noon.

NEW ORLEANS, *March* 30, 1869.

H. DOAM, *President.*

ED. A. PALFREY, *Secretary.*

[And on the 23d day of November, A. D. 1880, the following order to set this cause down for final hearing was filed in said cause by complainants, to wit:]

285 WILLIAM WALSH *vs.* J. D. MAYER & Co. *et al.*

The clerk will set this cause down for final hearing on bill, answers, replications, exhibits, and proofs.

NUGENT & McWILLIE,
Sol's for Complainant.

[And on the 26th day of November, A. D. 1880, the following depositions of J. D. Mayer, Henrietta Polydore, and R. Seal, witnesses for defendants, were filed in said cause, in the words and figures following, to wit:]

286 *Exhibit "A" to Deposition of J. D. Mayer.*

$7,500. NEW ORLEANS, *Jan'y 2d*, 1866.

Two years after date we promise to pay to the order of ourselves,

———, at ———, seven thousand five hundred dollars and no cents for value received, at the rate of six per cent. per annum from date until maturity and ten per cent. from maturity until final payment.

J. D. MAYER.
C. F. MAYER.
HENRIETTA POLYDORE.

(Endorsed:) J. D. Mayer, C. F. Mayer, Henrietta Polydore.

NEW ORLEANS, 1*st Sept.*, 1874.
Interest on within note paid in full to date.
WM. BARNES.

N. O., *Jan'y* 2, 1868.
Interest on the within note paid in full to date.
WM. BARNES.

NEW ORLEANS, *Oct.* 8, 1869.
Interest on the within note paid in full to date.
WM. BARNES.

NEW ORLEANS, *Oct. 8th*, 1871.
Interest on the within note paid in full to date.
WM. BARNES.

Interest on the within note paid to 1st Sept., 1873.
WM. BARNES.

287 *Exhibit B to Deposition of J. D. Mayer, referred to in Int.* 7.

$693.75. NEW ORLEANS, *Jan'y* 12, 1874.

On August 1st, after date, we promise to [—] the order of Wm. Barnes six hundred and ninety-three $\frac{75}{100}$ dollars, value received.

No.——, due Aug. 1 and 4.

Endorsed: Wm. Barnes.

288 In the Circuit Court of the United States, Southern District of Mississippi.

Interrogatories to be propounded to J. D. Mayer, Henrietta Polydore, and R. Seal, witnesses for the defendants in the suit pending in said court, wherein William Walsh is complainant and J. D. Mayer & Co. and R. Seal are defendants; the testimony of said witnesses were taken and returned to be read on behalf of the defendants at the hearing of said cause:

1. State the price agreed to be given by J. D. Mayer & Co. for Barnes Hotel, at Miss. City; how much was paid in cash at the time of the purchase; how much on time, and how the deferred payments were divided, how secured, and whether the copy annexed to these interrogatories as Exhibit (A) is the note last due.

2. Were the terms of this note, and the mortgage or deed of
289 trust given to secure it, ever changed; if so, when, and in

what particular, and was such change made in writing; give particulars of all dealings relating to the transactions from first to last.

3. State whether, at the date of the maturity of the note above referred to, you had not paid the interest it bore before maturity, and what amount was due on the note which matured prior to Jan'y 2d, 1868, and state what sum, principal and interest, was paid by your firm on the two notes, the amount of principal and interest paid on the note first falling due, as stated in the pleadings, and the amount of interest on the note falling due 2d Jan'y, 1868; append statements of payments of interest.

4. It is stated by complainant Walsh, in his bill, that about the date of the maturing of the note last fulling due, part of the
290 principal of the first remaining unpaid, and the interest on the second note, there was a payment by you of the balance of the first note, and the interest due on the last, and an agreement then entered into between your firm and Wm. Barnes, about the future payments; if there were such agreement, state what it was.

5. Did Barnes at that time, or any subsequent time, threaten to foreclose the deed of trust, or mortgage, on the Barnes Hotel unless payment was then made of the interest and past due principal of the first note?

6. It is further stated by the complainant, in his said bill, that about the date of the maturity of the last note Barnes agreed that so long as the interest was paid, and insurance money advanced by him was punctually paid, there were to be annual extensions of the time of payment of the last note, and that the principal of
291 the note should not be demanded until there was default in the payment of the interest and insurance money, and that the principal should not be due until default in the payment of interest and premiums advanced; if there was an agreement about interest and premiums, or if there was anything agreed upon or understood as to the time the principal, or any contract by which Barnes bound himself not to enforce payment of the principal, state what it was, giving the whole agreement, if such there was.

7. State where it was that your firm began to give notes for interest on the notes given for the hotel property, and what was the rate of interest, to whom you paid the interest on notes when due. Look at the copy of Exhibit No. 2 to the answer of J. D. Mayer & Co in this case and say whether that is the form and tenor
292 of the interest notes given, and whether that is the form and tenor of the premium notes for premiums of insurance.

8th. State whether these notes were given to be discounted, and whether the excess in the amount over the legal rate of interest, if there was such excess, was designed to cover discount, or was merely an increase of the rate of interest on the principal debt.

9th. Were the notes so given ever to your knowledge discounted, and were any of them ever presented for payment by any one except Barnes; and if so, by whom.

10th. At the time the notes were paid to Barnes, if paid to him did he make any statement of interest, or of the sum the notes called for.

11th. State whether or not, you paid the premiums of
293 insurance on the property, and whether insurance notes or notes including premiums included interest on the amount of insurance, and at what rate of interest.

12th. Who in fact urged the insurance of the property. Did the payment of the insurance premium, have any connection with delay in the payment of the principal note; if so, what connection.

13th. If you say that Barnes urged the insurance of the property—state what were his reasons—was it for his benefit, or the benefit of J. D. Mayer & Co.

14th. If there was ever an understanding as to the rate of interest to be paid, about the payment of increased interest about the 2d of January, 1868, or any other time, state when, and whether there was but one or more than one interview and agreement, and
294 was there such a thing as an annual or periodical renewal of this agreement.

15. If William Barnes ever agreed upon any consideration to delay suit on the principal note or to forbear foreclosure of the deed of trust, state when and upon what consideration, whether in writing or verbally, for what space of time was the delay, if any was agreed on to be.

16. Exhibit No. 2, referred to in 7th interrogatory, is a note due Sept. 1–4, 1874. State if the note was paid at maturity, and to whom? If you state that it was paid to Wm. Barnes in person, state whether he had possession of the note; what you know of the endorsement "Wm. Barnes" on the note; what Barnes said about the ownership of it; and if he spoke of the note for $7,500, state what he said about that, and whether he (Barnes) had pos-
295 session of it?

17. State whether Barnes or his wife interested themselves, and, if so, how in matters of the answer which J. D. Mayer & Co. were required to make at the suit of the Union National Bank against Wm. Barnes, and J. D. Mayer & Co. and Wm. Walsh, garnishees, in the circuit court of Harrison county, and mentioned in the pleadings; if they, or either of them, made any suggestions about the answer J. D. Mayer was to make, and what suggestions, and if they prepared, or caused to be prepared, any answer in writing for J. D. Mayer & Co.; give a copy if you have it; if not, give the tenor of the writings.

18. In the answer of J. D. Mayer & Co. [to] the bill it is stated that the mortgage given to the defendant, Union Bank, was a compromise of the attachment suit by said bank against Barnes as debtor and J. D. Mayer & Co. and William Walsh, garnishee. Explain this compromise.

296 19. What was William Barnes' pecuniary condition in 1874,

say in April, May, and June of that year, and if Barnes spoke to you in regard to it; state what he said.

20. Give your reasons for answering as garnishee, to the effect that the note for $7,500 last due for the hotel was the property of Barnes, if due to any one.

21. The answer of J. D. Mayer & Co. asserts that they paid Barnes interest at the rate of fifteen per cent. per annum on the note before referred to for $7,500; append to your answer to this question a statement showing the payments and amounts, and state whether in giving notes for interest they included interest on the $7,500 note at 15 per cent., and whether when notes were given for premiums advanced they included interest at that date.

297 Explain this matter fully, and state what connection the matter of insurance had with the delay in enforcing the debt due.

22d. Did you ever have any personal interview with Wm. Walsh, complainant, after he set up a claim to the $7,500 note; if so, state precisely what was said at such interviews, and how many you had.

Mrs. Henrietta Polydore.

1st. State whether you knew Wm. Barnes and his wife, Mrs. William Barnes, in 1873, 1874, and 1875; where they resided, and when Wm. Barnes died.

2d. State whether you are a member of the firm of J. D. Mayer & Co., of Mississippi City, conducting the Barnes Hotel.

3d. Who was the business man, or chief business man, of the concern.

298 4. State whether you ever conversed with Wm. Barnes whilst he held possession of the principal note for $7,500, and the interest notes last due, about the ownership of said notes; if so, state what he said.

5. State whether in the fall of 1874 or spring of 1875 you had a conversation with Mrs. Wm. Barnes at Mississippi City about the ownership of the said notes and about Wm. Walsh title to them, and how and for what purpose he held them; if so, state what the conversation was, and all that was said by her.

6 Did Wm. Barnes or his wife make to you or J. D. Mayer & Co. any suggestion about the answer you were to make as garnishee in the suit of the Union National Bank *vs.* Wm. Barnes, pending in the circuit court of Harrison county, at Mississippi City; if so, state what he suggested or urged about the answer, and whether they or either of them presented any written paper as an answer, and

299 asked you to sign it or adopt it; if so, attach the paper to this answer, if you have it, and if not, state its tenor or contents, and what became of it.

Roderick Seal, Esq.

1. Do you know the parties to the suit of Wm. Walsh *vs.* J. D.

Mayer & Co. and yourself and others, and the subject and object of this suit.

2. Give the history of the suit in general terms by the Union National Bank *vs.* Barnes, J. D. Mayer and Wm. Walsh, garnishees, in Harrison county, and of the facts connected with the mortgage given to the Union National Bank.

3. Was Wm. Walsh cognizant of the suit; was Barnes apprised of it; give your reasons for saying they or either of them knew of the suit.

300 4. How was L. L. Davis the clerk of the court related to Barnes, and what was Wm. Walsh's relation, social or otherwise, to Barnes and his family, during the time this suit was pending and prior to that date?

5. What was Barnes' pecuniary condition in 1873, 1874, [and] 1875?

6. State all you know touching the dealings of Wm. Barnes and Wm. Walsh with J. D. Mayer & Co., in respect to the note and mortgage in controversy in this suit; what you know of the ownership of said note, and every particular fact specifically and in detail.

W. P. HARRIS,
Sol'r for Def'ts.

301 *Cross-ints. to J. D. Mayer.*

The complainant reserving exceptions for incompetency, illegality, and irrelevancy to the ints. propounded to said Mayer, and numbered 4, 6, 5, 8, 16, 17, 19, 20, 21, propounds the following cross-ints.:

X-int. 1. How many conferences have you had with your solicitors, or either of them, prior to your examination in this cause?

X-int. 2. Did you have the ints. asked in your possession before you answered them; if so, how long, and when were your answers prepared, and by whom; were the ints. all read over by you before answering any?

X-int. 3. Did you read all of the ints. over before you answered any; if so, when, where, and why?

X-int. 4. Was the substance of the ints. communicated to you before you were asked to testify to them; if so, when, and by whom?

X-int. 5. Have you consulted with or spoken [to] your brother or sister as to your or their examination in the cause, or
302 they or either of them to you; have you seen your sister's testimony, or she yours; have you consulted with Mr. Seal?

X-int. 6. Were your answers reduced to writing before you came before the officer charged with the duty of taking your deposition; if so, when and where, and who was present with you; were they submitted to your attorney?

X-int. 7. Have your answers, as delivered originally to the commissioners, been modified by you at all; if so, in what particular?

X-int. 8. Where were you living and in what business were you

engaged when you purchased the Barnes Hotel property, or rather immediately prior thereto; and what amount of money did you, your brother, and sister have in your hands or possession at that time?

X-int. 9. Who made the contract for the purchase of said hotel property in the first instance; was it not made by Mrs. Polydore?

303 X-int. 10. What were the terms of the purchase; when was the first payment made, and its amount; when did the deferred payments mature, and their amounts and dates?

X int. 11. Did you not give a note for $7,500, due Jan'y 2, 1867, to Wm. Barnes, in part for the purchase money of the Barnes Hotel property; if, so, when was it paid; why was there any delay in the payment of this note; when was it finally extinguished; and how was the money raised to pay it?

X-int. 12. When the note for $7,500, due Jan'y 2, 1868, fell due, why did you not pay it; did you make any effort to pay it; were these efforts successful; why were they made?

X-int. 13. Did you ever employ Mr. S. A. Seeskind, of New Orleans, to negotiate a loan to pay said note; if so, when, why, what did he do, and with what result?

X-int. 14. When Seeskind failed to raise the money for you, what did you do; did you not make an agreement with

304 Mr. Barnes whereby you were to give him the notes of J. D. Mayer & Co. to cover the interest for the year ahead on said note, or to raise an amount sufficient to pay interest in advance for a year or so on said note; was not this arrangement known to and acquiesced in by Mrs. Polydore and your brother; were you not especially charged with the arrangement of this business?

X-int. 15. When was the arrangement first made to give the notes of J. D. Mayers & Co. to Barnes, for interest on the said $7,500 note, and how long was it continued?

X-int. 16. State fully what that agreement was; was it not this, that you were to give your notes for the interest on the note for the year ahead, and that Barnes should extend payment and not foreclose his mortgage; if not, what was the agreement? Answer fully, and state where it was made and who was present.

X-int. 17. Was it not understood at the time, and at all other times, when J. D. Mayers & Co. gave their notes for inter-

305 est that they thereby purchased immunity from suit or foreclosure proceedings for the year covered by the notes; if not, why did you give the notes?

X-int. 18. At the times you gave the notes of interest, did you think Barnes could sue you the next day on the note for $7,500, and forclose his mortgage; if so, why?

X-int. 19. In making the small notes for interest, upon what basis did you proceed? Explain the whole transaction.

X-int. 20. At the times you gave the small notes did you not in-

clude in them an amount sufficient to cover the premiums for fire insurance on the hotel property; if so, why?

X int. 21. Give the dates, amounts, and maturity, of all the small notes executed by J. D. Mayer & Co. for interest and fire insurance premiums, and state what part thereof was for interest on the $7,500 note, and what part for fire insurance premiums.

306 X-int. 22. Did J. D. Mayer & Co. keep a record of or book showing these transactions; if so, please exhibit and file the same with the commissioner so that, at least, he may make copies therefrom, and certify thereto at our expense?

X-int. 23. What part of the note Exhibit 2, to int. 7, propounded was for interest on the $7,500 note involved in the suit, and what for fire insurance premium? Answer definitely, and state for what amount the hotel property was insured, and at what rate.

X-int. 24. Why and at whose instance was the hotel property insured? Was it not part of the understanding at the time the payment of the note for $7,500, due Jan'y, 1868, was extended that Barnes was to keep the property under insurance at your expense? Have you any of the policies of insurance taken out under said agreement; if so, file them?

X-int. 25. When did you first consider that the $7,500 was barred by the the statute of limitation?

307 X-int. 26. Upon what is your answer to int. 3 based; do you speak from recollection, receipts taken, or books kept, or either? If so, please answer fully and file all receipts taken and your book of accounts, indicating on the latter the pages and lines on which the entries are made by appropriate letters or numbers.

X-int. 27. Was it not well understood by you respectively, J. D. Mayers & Co. and William Barnes, at the time you made the effort to raise the money to pay the note in suit and failed, that you were to give the notes of said Mayer & Co. to cover the interest and fire insurance premiums, so that Barnes could, if he found it necessary, endorse and sell said notes on the street and raise the interest and premiums, and that Barnes was not to foreclose his mortgage or sue him on the note?

X-int. 28. Do you not know that Barnes acted upon this belief at any rate?

X-int. 29. Did you not believe that when you gave the
308 small notes and paid them, Barnes had no right to foreclose his mortgage, and did you not act on that belief?

X-int. 30. Do you not know that Wm. Barnes actually sold many or some of the small notes given by J. D. Mayer & Co; was it expected when you gave them that Barnes should retain them until paid by you; were not some of these notes collected from you by L. L. Davis as an agent or att'y-at-law?

X-int. 31. Did Barnes insure your hotel property at any time prior to 1868; if so, file the policy or policies of insurance?

X-int. 32. At what rate could the notes of J. D. Mayer & Co. be discounted on the streets in New Orleans during the year 1868 and

subsequent years; did you ever try to negotiate such notes; is fifteen per cent. per annum an unusual rate of discount on such papers; why did you give small notes for interest at all?

309 X-int. 33. If in answer to 10th int. you say Barnes made any statement of interest, please file it.

X-int. 34. File all the small notes ever given and paid by you; if you cannot do so, state why.

X-int. 35. Have you in your possession any letters from Barnes on the subject-matter of the suit, or the note for $7,500 due Jan'y, 1868, or the small notes for interest and premiums of insurance; if so, file them, and file copies of all your letters to Barnes?

X-int. 36. Were not all your small notes for interest, &c., given in pursuance of the understanding had with Barnes in 1868; was not the basis on which your paper could ordinarily be discounted on the street in New Orleans, adopted as the rate of interest to be charged?

X-int. 37. If in answer to int. 16 you say Barnes had possession of the $7,500 note in suit when he presented the small notes for payment, did you then inform him the note was barred, and would not be paid by you; what did Barnes say to you on that oc-

310 casion, and what did you say to him; who else was present?

X-int. 38. If in answer to int. 17 you say an answer as garnishees was prepared for you, state in whose handwriting it was, and whether or not it was left with you for signature; where is it now; file it if you can procure it; if not, state how you are enabled to furnish a copy; and how you recollect its contents.

X-int. 39. Did you consult any attorney in respect to signing it; if so, who, and what advice did he give you on the subject; was your failure to sign it occasioned by his advice?

X-int. 40. What attorney arranged the compromise spoken of in answer to int. 18 for you, and who for the bank?

X-int. 41. If in answer to int. 20 you give reasons for making the answer to the bank garnishment, please state fully the facts at the bottom of the reasons; on what facts did your mind act?

311 X-int. 42. If in answer to int. 21 you give the statement called for, please give all the data on which the statement is based; if these data are taken from your books, please file them with your deposition, and state when, where, and under what circumstances the entries were made.

X-int. 43. How many small notes for interest and insurance premiums were given, how were they signed, and to whom, and when and where were they payable, and for what amounts were they given? Answer fully, and give a detailed tabulated statement thereof, filing the notes if you have them.

X-int. 44. Did you ever tell Wm. Walsh that the note for $7,500 in suit was barred by limitation; if so, when and where?

X-int. 45. If the note for $7,500 involved in the suit was barred by limitation on the 2-5 January, 1874, why did you give the

small note for $693.75 on the 12[th] January, 1874, seven days
312 after the bar had attached; and why the other small note for like amount; did not these notes include, and were they not given for interest on the said $7,500 note; have you a copy of your answer filed in this case, and did you read it before you gave your deposition?

X int. 46. Why was the large note for $7,500 in suit so written as to call for ten per cent. interest after maturity?

X-int. 47. Who prepared your answer as garnishee in the Union Bank suit, or the original draft thereof; by whom was his fee paid?

X-int. 48. Who negotiated the compromise with the Union National Bank; and why did you accede to it if your $7,500 note was barred by limitation; did you not have some doubts as to its being barred at all?

NUGENT & McWILLIE, *P. Q.*

313 *Cross-ints. to Mrs. Polydore.*

Complainant reserving exceptions to ints. 4, 6, 5, propounded to the witness, as being illegal and incompetent, and to the answers thereto for the same reasons, propounds the following cross-ints. to the witness. Answer the first seven ints. propounded to J. D. Mayer, and then the following:

X-int. 1. Were not the relations between J. D. Mayer & Co. and Mr. and Mrs. William Barnes of the most cordial and friendly character?

X-int. 2. Anterior to the purchase of the Barnes Hotel property, where were you and your brother J. D. and C. F. Mayer living, and in what business were you engaged; what sum of money did you all have?

X-int. 3. How did you happen to buy the said property; what contract did you first make with William Barnes for its purchase; how much cash were you to pay, and how much on time?

X-int. 4. When you came to conclude the trade with said
314 Barnes how much less than the sum orginally agreed upon as the cash payment did you have, and what change or modification in the contract of sale was made?

X-int. 5. After you made the contract of purchase, and after you failed to make the full cash payment, did not William Barnes have another offer and a better offer for the same property; why was not this other offer accepted; did not Mrs. Barnes intervene in your behalf, and insist upon her husband's carrying out his contract of sale with you; give the whole history of the purchase, and your connection therewith from the beginning, and the difficulties, if any, you encountered in perfecting it?

X-int. 6. Did you and your brothers not exhaust all your ready money when you made the cash payment on the property; and did you expect to pay the deferred purchase money in whole or in part out of the profit you were to derive from keeping the hotel and the

business connected therewith; if not, how did you expect to make the money necessary for the purpose?

315 X-int. 7. Was it not well understood at the time you concluded the purchase between you and William Barnes, that you would have to meet the balance of purchase money out of the profit of your anticipated business; and that if you failed, from any cause to do so, he was not to foreclose, but was to indulge you from time to time on payment of interest? Explain why the note was to bear ten per cent. interest after maturity.

X-int. 8. Was not this understanding and agreement acted upon by Mr. Barnes and by your firm?

X-int. 9. Was not the interest on said note paid up to Sept'r 1, 1874, in pursuance of this understanding and upon an agreement of extension by said Barnes?

X-int. 10. When did you first think the note for $7,500 in suit was barred by the statute of limitation; did you ever intimate that this was the case to William Barnes, or to the complainant; if so, when and under what circumstances?

316 X-int. 11. Did not William Barnes annually insure the hotel property while he owed the said $7,500; if so, upon what sort of agreement and understanding?

X-int. 12. If in answer to 6th int. you say that Barnes or his wife made any suggestion to you or J. D. Mayer & Co. about your answer to the garnishment of the Union National Bank *vs.* Barnes, pending in the circuit court of Harrison county, state why you did not then sign the answer prepared for your signature; if you do not file the original answer tendered you, state why; was it not left with you and prepared for your signature by one L. L. Davis, now deceased: where is it; if you file copy, please state when you procured it, and how you know it to be a copy; why was the answer prepared for you?

X-int. 13. Did you not decline to sign said answer because you desired to consult counsel; did you not so inform Barnes or his wife?

317 X-int. 14. Did you not consult an attorney; if so, who; did you act on his advice in declining to sign the answer prepared for you by Barnes or Davis; did said attorney prepare the answer filed or the draft of it?

X-int. 15. In your answer or garnishee you state that you have paid upon said note in the way of excess of interest, and deducting these several amounts paid in this way a balance upon the note of $2,509.76 was due; please explain fully how this balance was reached; give a full statement of the process by which this result was reached, including calculations and figures.

X-int. 16. Why did you consult a lawyer as to the answers you were to prepare in said case or garnishee?

X-int. 17. Did you think that William Barnes retained the right to foreclose his mortgage and sell you out after you had given him your small notes to cover the interest on the $7,500 note in suit

and the premiums for fire insurance premiums, and had from year to year paid them?

318 X-int. 18. In giving or consenting to the giving of the said small notes, did you not believe and think that William Barnes was morally and legally bound to give you time and not to sue on the large note or foreclose his mortgage on the hotel property; did he not think so too; did not he and you and your firm act on the same belief and understanding?

X-int. 19. Did the firm of J. D. Mayer & Co. keep a record or books of all their business transactions; if so, where are they?

X-int. 20. File all letters you received on the subject of this suit from Wm. Barnes.

NUGENT & McWILLIE, *P. Q.*

319 *Cross-ints. to Roderic Seal.*

X-int. 1. Do you know as a fact that William Walsh cognizant or apprised of the suit referred to in int. 2; how do you know it; when and how was he first apprised of it, and how do you know it; in what manner was he proceeded against in that suit?

X-int. 2. How do you know anything of the social relations or other relations existing between Barnes and Walsh, as inquired of in the 4th int.? Answer fully.

X-int. 3. How do you know anything of Barnes' pecuniary condition in 1873, 1874, 1875? From what source and how was your information derived?

X-int. 4. If you give any answer to 6th int., state how, from whom, and under what circumstances your information was derived, and how, from whom, when, and under what circumstances, your knowledge as to the ownership of the note sued on was derived, and the extent of that knowledge. Is your answer predicated of actual personal knowledge?

320 X-int. 5. Were you the att'y for the Union National Bank in the attachment suit against William Barnes; were you att'y for J. D. Mayer & Co.; were you att'y for any party to that suit; if so, who did you represent?

X-int. 6. Were you employed by J. D. Mayer & Co. to prepare, and did you prepare, their answer as garnishees in that case?

X-int. 7. Did they consult you in relation to your answer; did they at the time exhibit to you an answer prepared for their signature by William Barnes, or any other person for them; if so, why did you advise them not to sign and swear to it?

X-int. 8. Give the *exact facts* in relation to the compromise of said suit, and file all letters written by you on the subject, or copies thereof? Omit opinions or conclusions drawn by you from facts.

NUGEN & McWILLIE,
For Walsh.

321 Precedent formalities waived, as well as commission and consent given that the depositions of the witnesses may be

taken by and before F. S. Hewes, Esq., chancery clerk, upon the understanding that the witnesses are not to take the int's from the said clerk's office, nor be allowed to read or inspect them before answering, but are to answer the int's and X-int's as they are propounded by the court or clerk, and in their regular order, until the whole are answered; this exclusion not to extend to Mr. Seal.

NUGENT & McWILLIE,
For Compl'ts.

W. P. HARRIS,
Of Defendant.

322 Circuit Court of the United States for the Southern District of Mississippi.

WILLIAM WALSH *vs.* J. D. MAYER & Co.

Pursuant to the agreement annexed to the foregoing interrogaties, this day appeared before the undersigned, clerk of chancery court of Harrison county, Mississippi, the witnesses herein named, summoned to testify in behalf of the defendants, in a certain cause now pending and undetermined in the circuit court of the United States for the southern district of Mississippi, wherein William Walsh is complainant, and John D. Mayer & Co. are defendants, said witnesses being first duly sworn, depose as follows, to wit:

Roderic Seal, one of said witnesses, sworn as aforesaid, makes answer to said interrogatories, as follows:

Answer to first direct interrogatory:

I know the parties to the suit of Wm. Walsh *vs.* J. D. Mayer and others; the subject and object of that suit I suppose was to make the Barnes Hotel property liable for the balance of the purchase money.

323 Answer to 2d direct int'y:

The last of September or October, 1874, I was employed by C. Kohn, president of the Union National Bank of New Orleans, to sue Barnes in the circuit court of Harrison county, Mississippi, on a judgment of $4,456.85, due upon a judgment obtained against the said Barnes & John P. Williams & W. P. & T. M. Williams, composing the firm of John Williams & Sons, *in solido*; said judgment was obtained in the 5th district court for the parish of Orleans, in the State Louisiana, on the 22d of June, 1874; shortly afterwards W. A. Chaplin & Elliot Henderson were also employed by said bank. As Barnes was a non-resident of the State, and citizen of Louisiana, and owned a piece of real estate here, and J. D. Mayer & Co. being indebted to said Barnes for the balance of the purchase money for the hotel here, I advised the commencement of a suit, by process of attachment and garnishment, and had J. D. Mayer, Henrietta Polydore, and C. F. Mayer, composing the firm of J. D. Mayer & Co., and William Walsh, garnisheed under the statute. The matter was finally run into a judgment against Barnes, administrator.

324 J. D. Mayer & Co. were garnisheed, for the reason that I was informed, by all the parties that the debt was due from J. D. Mayer & Co. to William Barnes. I was informed at the time the attachment was sued out by J. D. Mayer & Co. of this fact, and by Wm. Barnes not long before.

Mr. Chaplin attended to the answer of J. D. Mayer & Co., as garnishees, and the amount after deducting compound interest is shown in the mortgage from J. D. Mayer & Co. to the Union National Bank; I had not looked into the papers myself. Mr. Chaplin stated to me in the presence of J. D. Mayer when he had prepared their answer that the claim or notes given by J. D. Mayer & Co. to Barnes were barred by the statute of limitations, and they could not be made to pay it, Chaplin was disposed to make that defence, and let them get out of it.

I remonstrated with Chaplin and the Mayers for making this defence in their answer to the garnishment for the reason that I had advised the bank to bring the suit, and my first duty was to the
325 bank, they however in their answer relied upon the statute of limitations as their defence, and on the hearing of the answer the circuit court held that the claim was barred, and they were discharged. Before the trial on the garnishment; I insisted that they should give a mortgage, or deed of trust to the Union National Bank for the amount that was found due Barnes, Chaplin advising against it all the time; I insisted so much on it, that they finally agreed to give the deed of trust or mortgage, provided that I would enter into a written agreement that they should never be troubled, and that they should have their own time to pay it to the bank, if they had it to pay. This was however never reduced to writing, that I recollect of, they took my word for it. I advised them to see Mr. Kohn and make their own terms with him. I afterward saw Mr. Kohn, and explained to him this matter of the statutes of limitation and what I had done, and he said it was all right, or words to that effect, and that his object was to get a judgment against Barnes,
326 not particularly Mayer, as Barnes had treated the bank badly. He never expected to give Mayer any trouble, at any rate he would not sacrifice the property. The president of the bank was not here when this arrangement was made.

Answer to 3d direct int'g:

I don't know that he was until he was served with the garnishment. I don't know of my own knowledge whether Barnes was or not until the attachment was sued out.

Answer to 4th direct int'g:

L. L. Davis, clerk of the circuit court, was Barnes' son-in-law. Walsh was boarding with Barnes and had boarded with him for many years, and was friendly to Barnes and his family, and they were very friendly, as they all spoke kindly of each other; and was the friend of Barnes during the pending of that suit before and since and is now, as I learn from Mrs. Davis and George, his daughter and son.

Answer to 5th direct interrogatory:

I was intimate with Barnes; was at his house and dined
327 with him frequently, and I was often in New Orleans during the years 1873, 1874, and 1875; I had thought that Mr. Barnes was a man of rather large means until a few months before the writ of attachment was sued out against him; in a conversation with him on the street in New Orleans about some business matters, he informed me that he was supporting his family in a great measure upon the interest he received from Mayer & Co., upon what was due him, and a small brokerage business upon the street.

Answer to 6th direct interrogatory:

I know nothing of the dealings between Wm. Walsh and Barnes, or with Walsh and Mayer & Co., of my own knowledge with respect to the note in controversy; all I know about the ownership of the note is that I have often heard Barnes speak of it, and met him when he came here to collect the interest, and having heard him speak of it a short time before that suit was brought, as re-
328 lying upon the interest on that note as a support for his family, and never having heard it questioned until the attachment suit was brought, or about that time; and the Mayers informed me that they owed it to Barnes when I brought the suit, and I often heard Mr. Davis, his son-in-law, speak of it; I was very intimate with Mr. Davis, and lived in his house many years.

R. SEAL.

Sworn to and subscribed before me, this 1st day of November, A. D. 1880.

F. S. HEWES, *Clerk.*

And to the cross-interrogatories said witness, sworn as aforesaid, makes answers as follows:

Answer to 1st cross-int'y:

I do not know of my own knowledge whether Wm. Walsh was apprised of the suit referred to in direct interrogatory No. 2 or not. I do not know when he was apprised of it, except when the garnishment was served upon him. He was proceeded against
329 in that suit as a garnishee.

Answers to 2d cross-int'y:

All I know about it is, that he was a boarder with Barnes; Barnes' family spoke very kindly of him, and he appeared to be at home, and was treated as a member of the family, as far as I observed. I have often heard L. L. Davis and his wife speak of the kindness of Walsh to the family; have often heard Barnes speak of his kindness and assistance in a suit between Barnes and Thompson in a settlement of copartnership transaction.

Answer to 3d cross-int'y:

What I know about it is what Mr. Barnes told me a short time before the attachment suit was brought, and also Mr. Davis, his son-in-law, informed me that Barnes had gone on Williams' note

for $19,000, and judgment had been obtained in the city of New Orleans against Williams and Barnes on that claim for ——,
330 and that Williams had large property, but in the name of his wife, and that it would all fall on Barnes, and that Barnes would be utterly ruined, but that Mr. and Mrs. Barnes had a marriage contract, and that Mrs. Barnes had sued Barnes and recovered judgment for enough to save the houses, or to that effect.

Answer to 4th cross-int'y:

My information was derived from Mr. Barnes, J. D. Mayer & Co., and L. L. Davis, son-in-law of Barnes, and being personally familiar with that transaction, having lived at Mr. Davis' house for many years, and Mr. Davis having read law with me, our relations were that of close friendship; when living with Mr. Davis I lived next door to the hotel, and frequently heard Mayer speak of their pecuniary condition, and complain of the exorbitant interest charged by Barnes on the note; they stated that they had always to advance the interest, and that when Barnes sold them the
331 hotel he sold them some hogs and cows that belonged to the hotel, which he never turned over to them, and a piece of land which was left out of the deed, and was afterwards sold as Barnes' property, all of which was worth at that time about $1,000, as they claim.

Answer to cross 5th interrogatory:

I was one of the attorneys in the attachment suit of the Union National Bank against William Barnes.

I was not the attorney of J. D. Mayer & Co. in that suit, as their interests would conflict with that of the bank; I was one of the attorneys only for the plaintiff, and represented the plaintiff only, and no one else in that matter.

Answer to 6th cross-int'y.

I was not employed by J. D. Mayer & Co. to fix up their answer; they stated that they did not know how to prepare their answer, and Mr. Champlin gave them the form, or told them how to
332 write it, but not as their attorney; the answer is in the handwriting of John D. Mayer.

Answer to 7th cross-int'y:

They spoke to me about their answer, but I left the matter to them and Mr. Champlin, as I was at that time otherwise busily engaged. They showed to me and Mr. Champlin an answer which they said had been prepared by Mr. Davis, Mr. Barnes' son-in-law, in reading it over I discovered, I think now, that it was in Mr. Davis' handwriting. They stated that Mr. Davis had come to them and wanted them to sign it and swear to it, and say nothing about it. J. D. Mayer and Mrs. Polydore stated that they refused to sign it because the statements in it were not true, and Davis knew it, and they simply asked us what we thought of it—not our advice—and we told them we thought it was a catch, and we stated we thought that they had done right not to sign a statement that they

333 knew was not true, but we gave them no advice because it was not necessary.

Answer to 8th cross-int'y:

I have stated all the facts I now recollect of the compromise of the Mayers with the bank, in the direct interrogatories. I have no recollection of having written to the president of the bank about the matter. I certainly have no copies. I had but one communication with the president about the matter, and that was some time afterwards, and was a verbal one.

R. SEAL.

Sworn to and subscribed before me, this first day of November, 1880. F. S. HEWES, *Clerk.*

J. D. Mayer, one of said witnesses, sworn as aforesaid, makes answer to said interrogatories, as follows:

Answer to 1st direct interrogatory:

334 The price agreed upon was $25,000. The agreement was $10,000 in cash, which was all paid at the time except a small balance, which was paid shortly afterwards; on time, $15,000, for which J. D. Mayer & Co. gave two notes of $7,500 each, which were so received. Exhibit (A) is a copy of the note last due.

Answer to 2d direct int'g:

The terms of the note and mortgage or deed of trust were never changed.

Answer to 3d direct int'g:

I don't think that there was anything paid on the note referred to as Exhibit (A) before maturity, I think that on the note which matured prior to Jan'y 2d, 1868, there was due at that time about $2,500, upon which I paid interest at 6 per cent. the first year, ten per cent. the second year, and 15 per cent. afterwards, until final payment, the date of which I do not recollect, and our memorandums of the transaction are misplaced. On the note fall-

335 ing due Jan'y 2d, 1868, we paid for two years interest at six per cent., and from that time 15 per cent., and sometimes compound interest. I cannot append statement for the reason above stated.

Answer to 4th direct int'g:

I have answered the first part of this interrogatory in my answer to the 3d. There was no agreement between my firm and Wm. Barnes, only that Barnes said he would have to raise the rate of interest to 15 per cent.

Answer to 5th direct int'g:

He never made any such threat at that time or after.

Answer to 6th direct int'g:

There never was any such agreement made or proposed to me.

Answer to 7th direct int'g:

To the best of my recollection, for the first two or three years the interest was paid in cash, then after that we gave notes, the

336 rate of interest was 15 per cent. generally, the interest was paid to Barnes in person. I think I paid one to L. L. Davis, son-in-law of Barnes, acting as his agent, so Davis said. Exhibit No. 2 is of the form and tenor of the interest notes given by my firm to Barnes. The premiums of insurance was included in that note. I think that the premium for insurance was generally embodied in the interest notes, when not so embodied they were of that form as well as I recollect.

Answer to 8th direct intg.:

Barnes never told me that he wished to discount the notes, and the excess in the amount over the legal rate of interest was only an increase of the rate of interest on the principal debt.

Answer to 9th direct intg.:

None of the notes were ever discounted to my knowledge; I don't remember of any of them being presented by any one but Barnes, except the one by Davis; I am not positive that I did
337 not pay one C. M. Soria; think it likely, if so, it was paid to him for Barnes during his absence.

Answer to 10th direct intg.:

I never had but one statement from Barnes, and that was in the handwriting of Wm. Walsh that contained a full statement, and was made, I think, about 1870 or 1871, which statement has been mislaid or destroyed.

Answer to 11th direct intg.:

We did pay the premiums of insurance on the property; whenever Barnes advanced the insurance, interest was paid on it at the rate of 15 per cent.

Answer to 12th direct intg.:

Barnes urged the insurance of the property; the payment of the insurance premiums did not have any connection with delay in the payment of the principal note.

Answer to 13th direct intg.:

338 It was for the benefit of Barnes; it was in the original contract that the property was to be insured for Barnes' security.

Answer to 14th direct int'y:

There was an understanding about January 2d, 1868; [you] would raise the rate of interest to fifteen per cent.; that understanding was at Barnes' house in New Orleans; there never was but that one; there never was such a thing as an annual or periodical renewal of the understanding, only we paid the 15 per cent.

Answer to 15th direct int.:

We never did have any such agreement, either verbally or in writing.

Answer to 16th direct int.

The note was paid at maturity, and to Barnes in person; he did have possession of it. It was not endorsed until after I had paid it; I asked him how it was that he held that note when Walsh had said that he owned it; he stated that I knew how it was,

339 giving me to understand that it was his, not being endorsed to any other party; I told him he had better endorse it, which he did; he did not at that time speak of the note of $7,500.

Answer to 17th direct int.:

Mrs. Barnes frequently inquired what our answer would be; that is the only way that she interested herself that I know of; Barnes was dead at the time; L. L. Davis prepared answer and presented to us, which he wished us to sign, but we refused to do so; I do not know by whose suggestion it was prepared; I have no copy of it, or the original, which Davis took away a day or two afterwards; as well as I recollect, it contained a denial of our owing Barnes anything, but an acknowledgment that we owed $7,500 on the property to Walsh.

Answer to 18th direct int.:

I was pursuaded by Mr. Seal to give the Union Bank a mortgage as a compromise and settlement; there was a verbal agreement
340 that the bank would not push me, and would charge me only a low rate of interest, and in the event of Walsh or Barnes collecting anything from us, the bank would not hold us on the mortgage.

Answer to 19th direct int.:

I don't know of my own knowledge what his pecuniary condition was, only by report, that he was tight pressed; I do not remember that Barnes spoke to me about it.

Answer to 20th direct int.:

We gave Barnes the note; never heard of a transfer, and from what he said when he collected the interest note, he led me to believe that it was still his.

Answer to 21st direct int.:

We did pay interest at 15 per cent. on the $7,500 after maturity. I cannot append statement of payments and amounts, because the memorandums and interest notes have all been destroyed or
341 mislaid; the interest notes were for interest at the rate of 15 per cent. on the $7,500 note, interest on premiums were at the same rate; the premiums fell due in the winter, as also did the interest notes, when my business was dull, and we paid the 15 per cent. for the accommodation for advancing the premiums; the insurance had nothing to do with the delay in enforcing the debt due.

Answer to 22d direct int.:

Wm. Walsh spoke to me once or twice but not on the subject of the $7,500 note, as I remember he spoke about the insurance; he had written to me previously stating that he was owner of two interest notes and the note of $7,500; the interest notes were afterwards paid to Barnes.

J. D. MAYER.

Sworn to and subscribed before me, this 23d day of November, 1880.

F. S. HEWES, *Clerk.*

And the said J. D. Mayer, sworn as aforesaid, makes
342 answer to the cross-interrogatories herein to him propounded as follows, to wit:

Answer to 1st cross-interrogatory:

I have conferred with my solicitor, W. P. Harris, twice.

Answer to 2d cross-interrogatory:

I did not have the interrogatories in my possession before my answers were given; have never had them in my possession, and they were not read over to me before answering any of them. Not prepared by any one, but answered as read to me by the clerk.

Answer to 3d cross-int'g:

I did not read any of the interrogatories before answering them, I answered them one by one as read by the clerk.

Answer to 4th cross-int'g:

They were not.

Answer to 5th cross-int'g:

I have not consulted with my brother or sister as to my
343 examination, or theirs, in this case; I could not do so as I did not know what questions had been propounded. I have not seen my sister's testimony, nor has she seen mine. I have not consulted with Mr. Seal as to my answers to my interrogatories.

Answer to 6th cross-int'g:

My answers was not reduced to writing until written down by the clerk on this examination.

Answer to 7th cross-int'g:

My answers have not been modified or altered, they stand as taken down by the clerk.

Answer to 8th cross-int'g:

I was living in Arkansas; business that of a carpenter and builder; we had in money and cotton about $10,000.

Answer to 9th cross-int'g:

It was made by Mrs. Polydore.

Answer to 10th cross-int'g:

344 The purchase was for $25,000; the first payment was for $10,000 cash; most of it was paid in April, 1866, I think, and the balance during the summer; the deferred payments matured in July, 1867, and Jan'y, 1868, and both were for $7,500.00.

Answer to 11th cross-intg:

I did give Wm. Barnes a note for $7,500, due Jan'y 2, 1867; most of it was paid in the fall of 1867; I think the balance was paid during the next year; the delay was caused by want of funds; the note was finally extinguished—I *think* in 1868; the money was raised out of our business.

Answer to 12th cross-intg:

The note for $7,500.00 due Jan'y 2d, 1868, was not paid because we did not have the money; we made an effort to make the money in our business, but were not successful; our business was not good in 1868.

Answer to 13th cross-intg:

345 I never employed Mr. S. A. Seeskind to raise money to pay the note; I employed him to raise some money to pay the interest at one time, which was done by a note endorsed by Barnes, as I recollect.

Answer to 14th cross-intg:

When the note became due and we were unable to pay it, Mr. Barnes said he would have to raise the rate of interest to 15 per cent., which we agreed to; we did not make an arrangement with Barnes to give him notes to cover the interest ahead, but frequently did so for his accommodation; Mrs. Polydore and my brother were aware of these notes being given; I generally attended to all of that class of business.

Answer to 15th cross-intg:

I think that we commenced to give interest notes in 1869 or 1870, and it was continued until Jan'y, 1874.

Answer to 16th cross-intg:

346 There was no agreement except that Barnes said he would raise the rate of interest, and we agreed to that; there was nothing said by Barnes about a foreclosure; the understanding about the interest was had in Barnes' house in New Orleans, and I think that Mr. Walsh was present.

Answer to 17th cross-int'g.:

There was no such understanding; we gave the notes for the accommodation of Barnes, so that he could use the money.

Answer to 18th cross-int'g.:

I did think that Barnes could foreclose at any time he felt disposed; there was nothing to prevent him.

Answer to 19th cross-int'g.:

We calculated 15 per cent. on the note, and in several cases compound interest was added; Barnes came at different periods, I suppose, when he wished to raise money, and the notes were given.

347 Answer to 20th cross-int'g.:

Sometimes we did and sometimes we did not, to reimburse Barnes for advancing the money.

Answer to 21st cross-int'g.:

I cannot give the dates, amounts, and maturity of all the small notes, as when they were paid they were generally destroyed, nor can I answer the rest of the interrogatories for the same reason and because I have no memorandum.

Answer to 22d cross-int'g.:

We did not keep a record of or book showing these transactions; we did have some memorandums, but they are misplaced or destroyed.

Answer to 23d cross-int'g.:

$1,125.00 was for interest on the note and $262.20 was for the premium for the insurance and interest at 15 per cent. for advancing by Barnes; I cannot now state what the hotel was insured for,

or the rate, as Barnes always held the policy and notified me
348 at the time, but I do not now recollect.

Answer to 24th cross-int'g.:

It was the contract when the hotel property was first purchased that the property was to be insured, and that Barnes was to hold the policy, which he did; I never had one; there was never any other agreement about insurance.

Answer to 25th cross-int'g.:

Not until the suit of the Union National Bank against Barnes commenced, and we were garnished.

Answer to 26th cross-int'g.:

My answer to 3d int'g. is from recollection; as stated before, the receipts and memorandums have been misplaced or destroyed; I never kept any books containing anything relating to this transaction, and therefore cannot file any.

Answer to 27th cross-int'g.:

There never was any such understanding talked about; I
349 never knew of Barnes putting one of the notes on the street for sale.

Answer to 28th cross-int'y:

I do not know it.

Answer to 29th cross-int'y:

I thought that he had a right to foreclose his mortgage at any time he felt so disposed, and therefore did not act under any other belief.

Answer to 30th cross-int'y:

I do not know that he ever sold one of the small notes; I did not expect anything; they were his, to do with as he felt disposed; I remember paying him one note as agent for Barnes; I think Barnes was away at the time.

Answer to 31st cross-int'y:

All the insurance effected upon the hotel property at any time up to the garnishment was done by Barnes; I therefore suppose that he was so insured prior to 1868, as I never held the policy.

350 Answer to 32d cross-int'y:

I cannot tell, as I never knew of one of our notes being offered for sale on the streets of New Orleans, either in 1868 or since; I never tried to negotiate such notes; I once applied to Seeskind to raise some money to pay interest on our paper endorsed by Barnes; I cannot say whether 15 per cent. discount is an unusual rate or not on such paper, as I have never handled much of it; because we could not pay the money at the time it fell due we gave the notes; the interest fell due in our dull season, and it was inconvenient to pay it.

Answer to 33d cross-int'y:

Barnes did give me one statement, in the handwriting of Mr. Walsh; it is mislaid—I cannot find it.

Answer to 34th cross-int'y:

I cannot file the small notes, because they are mislaid or destroyed; most of them I know were destroyed when paid.

351 Answer to 35th cross-intg:

I have no letters from Barnes, or copies of letters written to him, not being in the habit of filing letters received, or taking copies of letters sent.

Answer to 36th cross-intg:

They were given in pursuance of the understanding about interest at 15 per cent. Nothing was said about the rate of discount of our paper on the street in fixing the rate of interest.

Answer to 37th cross-intg:

I did not inform Barnes that the note was barred; I did not know it myself at that time, thinking that a mortgage note never was barred. I did not tell him that it would not be paid. I asked Barnes how it was that he had that note, when Walsh had written to me that he owned it, and the other interest note, as well as the note for $7,500. He answered, you of course know how it is,

352 which led me to infer that they were still his. The first interest note was paid, but not endorsed until after it was paid, and then at my suggestion. No one was present but Mr. Barnes and myself.

Answer to 38th cross-intg:

There was an answer as garnishee, prepared for us by L. L. Davis, in his handwriting. It was left with us for our signature, but on our refusing to sign, it was taken away by Davis; I cannot tell where it is now; I cannot procure it; I am unable to furnish a copy, because I have not the original or a copy of it; I do not recollect the contents fully, only a part of it, which impressed me that was that we were to state that we did not owe Barnes anything, but owed Walsh.

Answer to 39th cross-intg:

We did not; we had been told by our attorney not to sign anything without his seeing it; Davis took it away before he ever saw it.

353 Answer to 40th cross-int'g:

Roderick Seal acted for both parties in the compromise with the Bank; that is, it was suggested by Mr. Seal.

Answer to 41st cross-int'g:

From what Barnes said when I paid him the interest note, and because I never knew of any transfer, I supposed the note to be his, I thought, from what Barnes said and from his manner, that Walsh's claim to the notes was only a cloak.

Answer to 42d cross-int'g:

I have given no statement for the reasons given.

Answer to 43d cross-int'g:

I cannot recollect how many small notes were given; they were generally made like Exhibit No. 2, I think, always for different amounts, which I do not recollect, but always for an amount sufficient to cover interest and insurance. I cannot file statement

354 because, as stated, the memorandums and notes have been mislaid or destroyed.

Answer to 44th cross-int'g:

I never remember telling Wm. Walsh the $7,500 note was barred.

Answer to 45th cross-int'g:

We did not know, at the time we gave the small note for $693.75, that the note for $7,500 was barred; never thought of such a thing; for the same reason we gave the other note. They did include and were given for the interest on the note for $7,500, also including insurance. I have a rough copy of my answer; I have only read it once, and that was before I knew that there were any interrogatories drawn up.

Answer to 46th cross-int'g:

So written in accordance with the contract of purchase.

Answer to 47th cross-int'g:

Mr. W. A. Champlin prepared the draft of our answer as garnishees in the Union Bank suit; his fee has not been paid to my knowledge.

355 Answer to 48th cross-int'y:

Roderick Seal negotiated or suggested it, and it was solely at his request that we made the compromise; we objected, but were finally persuaded to do it, and we thought that it might be a benefit to our credit in future; I did not have any doubt as to the note being barred after Mr. Champlin told me so.

J. D. MAYER.

Sworn to and subscribed before me, this 23d day of Nov., 1880.

F. S. HEWES, *Clerk.*

Mrs. Henrietta Polydore, a witness to whom the foregoing interrogatories, direct and cross, are propounded, being first duly sworn, makes answer as follows, to wit:

Answer to 1st direct int'y:

I did not know Wm. Barnes and his wife in 1873, 1874 and 1875; they resided in New Orleans; I think Wm. Barnes died about five years ago.

356 Answer to 2d direct int'y:

I am a member of the firm of J. D. Mayer & Co.

Answer to 3d direct int'y:

John D. Mayer.

Answer to 4th direct int'y:

I had many conversations with Wm. Barnes; he told me that he owned the notes, the interest notes and the principal note; he told me so the last time I saw him; when he came to collect the interest he inquired why I asked him; I told him that I had heard that he had or would be obliged to part with them; he said he had borrowed some money on the strength of them, but he had not parted

with the notes, and he wanted the interest to pay back the borrowed money.

Answer to 5th direct int'y:

357 I don't think I had any conversation with Mrs. Barnes about their owning the notes; she told me that whatever Mr. Walsh did was for her interest; she said that Walsh had the notes, but I quite understood for her benefit; I don't recollect the dates, but I think this was after Mr. Barnes' death; on consideration I am quite sure that the conversations with Mrs. Barnes was after the death of Mr. Barnes; she repeatedly told me that Mr. Walsh was acting for her.

Answer to 6th direct int'g:

Mrs. Barnes told us to say that we owed Wm. Barnes nothing, but that we owed Wm. Walsh, that he had bought the note, and asked us to sign a document that Mr. Davis had drawn up, which we were told by the lawyers not to do. Davis took the paper away in a day or two, and I therefore cannot attach it to this answer. It was to the purport that we did not owe Barnes, that is all I remember about it.

HENRIETTA POLYDORE.

Sworn to and subscribed before me, this 23d day of Nov., 1880.

F. S. HEWES, *Clerk.*

358 And said witness so sworn as aforesaid to the cross-interrogatories to her propounded, makes answer as follows, to wit:

Answer to cross-int. 1st:

Always.

Answer to cross-int. 2d:

Living in Arkansas, we had a farm, and kept a little store, my brothers worked at their trade, I can't say what amount of money we all had.

Answer to 3d cross-int'g:

I was visiting Mrs. Barnes, I was speaking of liking this place very much, and Mr. Barnes said it was for sale, he told me what it would be sold for, he waited two weeks for my answer, and we then closed the contract. We purchased everything in Mississippi City known as belonging to Wm. Barnes, for $25,000, except a mule and cart, the purchase included hogs and cattle, and some

359 land which we never got. We were to pay $10,000 cash, and the balance on time.

Answer to 4th cross-int'g:

About $2,000; we gave a note for that amount.

Answer to 5th cross-int'g:

Before the contract was finally settled I had an offer through Mr. Barnes, for $5,000 to give the purchase up to Mr. Calvert Roberts; there was no other offer that I know of. Though I was a day or two behind time, Mr. Barnes made no objection to fulfilling the contract; Mrs. Barnes did not intervene in my behalf that I

know of; I had no difficulty in perfecting the purchase; there is no history about it.

Answer to 6th cross-int'g:

We did not wholly exhaust our means in the purchase; we had money enough for the necessary expenses, and some due us, and some cotton; we did expect to pay a part any way of the deferred payments out of the profits of the business.

360 Answer to 7th cross-int'g:

There was never a single word said about how we were to meet the balance of the purchase money, nor anything about foreclosure, and there was no arrangement or understanding, but we were to pay the notes and interest as they became due; Mr. Barnes made out the deeds and notes that way, and I signed them without any questions being asked.

Answer to 8th cross-int'g:

There was no such agreement to act upon.

Answer to 9th cross-int'g:

There was no agreement or understanding about it.

Answer to 10th cross-int'g:

Mrs. Barnes told me that it was barred; when she was here to get me to sign the answer that Mr. Davis presented, I told her that Fred and John would not sign, and she then said she knew

361 what they intended to do, to claim the bar; Wm. Barnes was dead before I knew the note was barred, and I do not remember telling the complainant that it was barred.

Answer to 11th cross-int'g:

I know that he did insure and held the policy, but do not know the agreement and understanding, John attended to that.

Answer to 12th cross-int'g:

We did not sign the answer because we did not consider it true, Mr. Barnes having told me that he owned the notes; Davis took the answer he prepared away, so I cannot file it; it was left with us for a day or two by Mr. Davis, and then, as I have said, taken away by him; I don't know where it is; Mr. Davis took it away; I never made any copy; I can't tell why it was prepared; not at my request.

Answer to 13 cross-int'g:

I told Mrs. Barnes I would not sign it without consulting

362 counsel; and another reason, I knew Mr. Barnes owned the note because he said so.

Answer to 14th cross-int'g:

I did not consult an attorney about signing the answer prepared by Mr. Davis, I had consulted them before and they had told me to sign nothing, both Seal and Champlin; I don't know who prepared the answer filed.

Answer to 15th cross-int'g:

The calculations were made upon a statement of Mr. Walsh, by an accountant, Mr. Craig, who is now dead, and the papers are mislaid or lost, and I cannot therefore give the figures.

Answer to 16th cross-int'g:

Because I did not know anything about answering in court.

Answer to 17th cross-int'g:

I know he had the right to sell us out at anytime; I always thought so, if he felt so disposed.

363 Answer to 18th cross-intg.:

I did not think he was bound in any way; he never expressed any opinion about it to me; there was no such belief or understanding; Barnes always appeared satisfied with his interest, and I continually complained that it was too much; never was anything said about foreclosure not once named.

Answer to 19th cross-intg.:

Did not keep books in which such transactions were entered; we are brothers and sister—one family—and keep no accounts between each other, only hotel books.

Answer to 20th cross-intg.:

I have no letters from Wm. Barnes on the subject.

HENRIETTA POLYDORE.

Sworn to and subscribed before me, this 24th day Nov., 1880.

F. S. HEWES, *Clerk.*

364 THE STATE OF MISSISSIPPI, *Harrison County:*

I, F. S. Hewes, clerk of the chancery court of said county and State, do hereby certify that J. D. Mayer, Henrietta Polydore, and R. Seal, to whom the foregoing direct and cross-interrogatories were propounded, appeared before me as stated in the foregoing answers, and testified as stated; which depositions contained in the annexed and foregoing 40 pages and part of this, being by me taken down in my own handwriting, and being read over to said witnesses, were by them approved, sworn to, and subscribed. And I further certify that the conditions upon which said depositions were to be taken by and before me have been strictly complied with; all which I enclose and direct to the clerk of the circuit court of the United States for the southern district of Mississippi.

Given under my hand and official seal at Mississippi City, this 24th day of November, A. D. 1880.

[SEAL.] F. S. HEWES, *Clerk.*

365 [And on the 2d day of February, A. D. 1881, the following entry was made on the record of said court, to wit:]

WM. WALSH *vs.* J. D. MAYER & Co. *et al.*

Set down for final hearing by complainants on bill, amended bill, answers, replications, exhibits, proofs, proceedings had, &c., &c.

[And on the 10th day of February, A. D. 1881, the following interlocutory decree was made by said court in said cause, and entered of record in the words and figures following, to wit:]

366 WILLIAM WALSH, Complainant,
vs.
J. D. MAYER & Co. *et als.*, Defendants, } 297.

This cause having been submitted at a former day of the term upon the pleadings, exhibits, proofs, &c., and the court having sufficiently examined and consider the same is of opinion, and, therefore, orders, adjudges, and decrees, as follows:

1. That the promissory note for seventy-five hundred dollars exhibited with the bill is a Louisiana contest, and governed by the laws of that State, but that the statute of limitation of this State must be applied to this case, unless it has been waived or such other action had by defendants to take it out of the statute, or estop defendants from setting it up.

2. That upon all the facts of this case the action had by and correspondence between the parties, the bar of the statute of limitation does not attach in this cause, and the complainant is entitled to the relief hereafter stated.

3. That having purchased the note exhibited with his bill
368 with knowledge of the facts, the complainant stands in no better position than would Barnes were he living, in this cause, and is to be affected with all the equities between Barnes and J. D. Mayer & Co.

4. That the said note for $7,500, calling for interest after maturity at ten per cent. per annum, was in contravention of the laws of Louisiana, and all interest sums paid thereon after its maturity are forfeited, and must be regarded and treated as part payments of the principal thereof; and for any balance which may be found after the deduction of such payments, the complainant is entitled to a decree and a foreclosure of the mortgage exhibited with his bill for the satisfaction thereof.

5. That to ascertain the balance due upon the said note, the papers of this cause are referred to James M. McKee, clerk and master, who will find from the papers and proofs the total amount paid by
J. D. Mayer & Co. to William Barnes, and complainant, by
369 way of interest on the said note after its maturity, and deduct the same from the said note, and report the balance due, on which balance he will allow interest at five per cent. from the filing of the bill in this cause.

6. That the note and mortgage of the Union National Bank, according to the understanding and agreement of the parties, are of no effect, and cannot be enforced by said bank against said J. D. Mayer & Co.

Ordered, adjudged, and decreed, this 10th February, A. D. 1881.

R. A. HILL, *Judge.*

[And on the said 10th day of February, A. D. 1881, the following note of pleadings and proof used on the final trial of the cause was entered on the records of said court, to wit:]

370 WILLIAM WALSH *v.* J. D. MAYER & Co. *et als.*

On the final hearing of this cause the complainant, after the reading of all the pleadings offered in evidence, the deposition of William Walsh, Mrs. Barnes, Mrs. Davis, and Seeskind, all the deeds, notes, accounts, and papers filed and exhibited with the bill, and the policies of insurance heretofore filed in the cause; and counsel for defendants read the depositions of J. D. Mayer, Roderick Seal, and Henrietta Polydore, the transcript exhibited with the answer of J. D. Mayer & Co., and the small note attached thereto.

This was all the evidence in the cause.

[And on said 10th day of February, A. D. 1881, the following motion was entered in said cause by complainants, to wit:]

371 WILLIAM WALSH, Complainant,
vs.
JOHN D. MAYER & Co. *et als.*, Defendant. } 297.

The complainant moves the court to modify the fifth stipulation in the decree of this date, entered in this cause for the following reasons:

1. The said stipulation is not in harmony with the opinion of the court, and its judgment and decree as expressed in the first stipulation thereof.

2. If the law of Louisiana is to govern the payments made, were all expressly imputed by the parties to the interest, and can neither be recovered back nor set off against the principal.

3. It is shown in the cause that extension of payment of the note for $7,500 was the consideration for the small notes given, and by the laws of Louisiana this is a valid consideration, as to which usurious interest cannot be predicated, and against the small notes it
372 could not be set up. These notes were valid obligations in the hands of Barnes and Walsh.

NUGENT & McWILLIE, *P. Q.*

[And on the 11th day of February, A. D. 1881, the report of the clerk and master was filed in said cause, and is in the words and figures following, to wit:]

373 WM. WALSH *vs.* J. D. MAYER & Co. *et als.*

The undersigned, clerk and master, to whom was referred the papers in the above-stated cause, to find from the papers and proofs the total amount paid by J. D. Mayer & Co. to Wm. Barnes and compl'nt, by way of interest, on the note set out in compl't's bill since its maturity, and to deduct the same from the principal of said note, and on the remainder thus found, to calculate interest at the rate of 5 per cent. per annum from the date of filing complainant's bill herein, to this 10th Feb'y, 1881, respectfully reports that he finds that said J. D. Mayer & Co. paid interest on said note of

	$7,500.00 from Jan'y 2d, 1868, (date of maturity,) to the 8th day of October, 1869, being 1 year 9 months and 6 days, at 10 pr. ct. per annum	$1,325 00
	And from 8th October, 1869, to the 1st Sept., 1874, being 4 years 11 months and 23 days, at 10	
374	per cent. per annum	5,509 37
	Total interest paid since maturity	$6,834 37
	Which said sum of $6,834.37 being deducted from $7,500.00, the principal of said note, leave balance of	$665 63
	On which said last-named sum your court has calculated interest at the rate of 5 per cent. per annum, from Dec. 29, 1879, when complainant's bill was filed, to this 10th Feb'y, 1881, being 1 year 1 month and 11 days	37 06
	Total	$702 69

Which said sum of $702.69 your commissioner finds to be the total amount due to complainants.

Respectfully submitted this 10th Feb'y, A. D. 1881.

JAS. M. McKEE,
Clerk and Master.

[And on said 11th day of February, A. D. 1881, complainants filed their exceptions to the report of the clerk and master, in the words and figures following, to wit:]

375 WILLIAM WALSH, Complainant,
vs.
J. D. MAYER & Co., *et als.*, Defendants.

And the complainant now comes by his solicitors and excepts to the report of the commissioner computing the amount due him for the following reasons:

1st. The commissioner has charged up against complainant as interest for the year ending Sept., 1874, the amount paid by Mayer & Co. on complainant's small notes purchased by Barnes, when in fact no such charge for interest should be made.

2d. The commissioner has charged up against complainant as interest, amounts realized by Barnes as the purchase money of the small notes executed by Mayer & Co. which were sold by Barnes to Howell, (?) Soria, and Walsh, and which were taken up by Mayer & Co. in the hands of the holders. If these small notes were illegal and void, Mayer & Co. should have resisted their payment and avoided them for usury.

376 3. The commissioner should not have charged up to complainant an amount greater than five per cent. per annum.

The small notes were payable and were paid in Mississippi, and it was competent to give them to the extent of ten per cent. upon the debt sued for forbearance.

4. The commissioner should not have charged against the principal debt of complainant any sums of money heretofore paid as interest, all such payments were by the parties imputed to interest at the time of payment, and cannot now, as against complainant, reverse that imputation.

5. The small notes given were supported by a valid consideration, and were valid debts in the hands of Barnes or his vendees, and when paid *could not* under any circumstances be imputed to the principal of complainants' debt.

NUGENT & McWILLIE, *P. Q.*

377 [And on the 12th day of February, A. D. 1881, the following interlocutory decree was made in said cause and entered of record in the words and figures following, to wit:]

WM. WALSH *v.* J. D. MAYER & Co. *et als.*

This day came on to be heard, as well the motion of complainants to modify the fifth stipulation of the decree heretofore entered herein, as the exceptions of complainants to the report of the clerk and matter filed, and the court being thereof sufficiently advised, doth order, adjudge, and decree that the said motion and said exceptions be and the same are hereby overruled, to which rulings of the court complainants excepted and his exceptions were allowed.

[And on the 12th day of February, A. D. 1881, the following decree was made and entered in said cause in the words and figures following, to wit:]

378 WILLIAM WALSH, Complainant, *vs.* J. D. MAYER & Co. *et al.*, Defendants.

Be it remembered, that this cause came on this day to be finally heard upon the pleadings, proofs, &c., and report of commissioner, stating the amount due to the complainant under the former decree of this court, which is hereby in all things ratified, approved, and confirmed, and the court being sufficiently advised thereof doth order, adjudge, and decree that unless the defendants do within thirty days pay to the complainant seven hundred and two $\frac{69}{100}$ dollars, the amount reported to be due him, with interest from this date, at the rate of five per cent. per annum, and the costs of this cause, the complainant's lien, arising upon the trust deed exhibited with his bill, be enforced, and the defendant's equity of redemption in and to the lands set out in said deed be barred and foreclosed, and that James M. McKee be and he is hereby appointed a special
379 commissioner in this cause, and as such he is directed to take possession of the lands set out in said trust deed, to wit, a certain tract of land, together with the buildings and improvements

thereon situate, lying and being in Mississippi City, Harrison county, Mississippi, known as Barnes Hotel, commencing at a stake on the Gulf of Mexico, which stake stands due south of the southwest corner of the hotel building, and running thence east 414 feet more or less along said Gulf shore to a street or road called Texas street, due north to the hotel wharf, and running thence north to the township line, between township seven and eight, range eleven west, thence due west with said township line 414 feet more or less to a stake, thence south to the sea-shore or place of beginning; bounded south by the Gulf of Mexico, north by the township line, west by the property of Mrs. Martha A. Davis, east by Texas street; and another tract adjoining the above and known as the lot upon which is situated the billiard rooms, &c., of Barnes Hotel, and
380 described as follows, viz: Commencing at a stake on the shore of the Gulf of Mexico on the east side of the road or street called Texas street, and running thence alongside said Gulf shore east 334 feet more or less to the southwest corner of George Wiggs' property, thence north with the line of said Wiggs' lot about one-eighth of a mile to the southeast corner of S. Callen's property, thence west with the line of said Callen's lot, 334 feet more or less, to the street or road called Texas street, thence south with said street to the place of beginning; bounded south by the Gulf, north by S. Callen's property, west by Texas street, and east by the property of Geo. Weggs, all in section one, township eight south, of range eleven west; and to sell the same for cash or so much thereof as may be necessary to pay the costs of this cause and the amount due the complainant, after thirty days' notice of the time, place, and terms of sale, by advertisement in the Weekly Clarion, or some other newspaper printed and published in the city
381 of Jackson, in this district, and to execute deed to the purchaser, and put him in possession of the property sold.

He will apply the proceeds of sale first to the costs of this cause, next to the complainant, and the balance, if any, to defendants.

And it is further adjudged and decreed that nothing herein contained shall effect or prejudice complainant's demand against defendants, J. D. Mayer & Co., for insurance on said property as a personal claim.

And the complainant having prayed an appeal from this decree to the Supreme Court of the United States, the same is granted upon his entering into bond in the penalty of one thousand dollars, with security, to be approved by one of the judges of this court, and conditioned according to law.

Ordered, adjudged, and decreed, this 12th day of February, A. D. 1881. R. A. HILL, *Judge.*

[And on the 25th day of February, A. D. 1881, complainant filed his appeal bond, which is in the words and figures following, to wit:]

382 WILLIAM WALSH, Complainant,
vs.
J. D. MAYER & Co. and others, Defendants.

Know all men by these presents, that we, William Walsh, as principal, and William L. Nugent and A. Boarman, as securities, are held and firmly bound unto J. D. Mayer, C. F. Mayer, and Henrietta Polydore, constituting the firm of J. D. Mayer & Co., the Union National Bank, and —— Schmidt and —— Zeigler, of the firm of Schmidt & Zeigler, in the penal sum of one thousand dollars, to be paid to them and his or their executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and we and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 21st day of February, A. D. 1881.

Whereas the above-bounden William Walsh hath taken an appeal to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled cause by the
383 said circuit court of the United States for the southern district of Mississippi, in equity.

Now, therefore, the condition of this obligation is such that if the above-named William Walsh shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

WM. WALSH. [SEAL.]
A. BORMAN. [SEAL.]
W. L. NUGENT. [SEAL.]

I approve the above and foregoing appeal bond.

R. A. HILL,
District Judge of Mississippi, and one of the Judges of the Circuit Court of the United States in said State.

[The opinion of the court rendered in said cause is the words and figures following, to wit:]

384 In the Circuit Court of the United States for the Southern District of Mississippi.

WM. WALSH *vs.* J. D. MAYER & Co.

This cause is submitted upon bill, answers, exhibits, and proofs, from which the following facts appear:

On the 2d day of January, 1866, the defendants purchased from William Barnes, who then resided in the city of New Orleans, and the defendants then being residents of the State of Arkansas, the hotel property situate in Mississippi City, in this State, known as the Barnes Hotel, and to secure the payment of the last instalment of the purchase money, executed their promissory note for seventy-five hundred dollars, payable two years after date, with six per

cent. interest thereon until due and ten per cent. thereafter until paid, which note was made payable to themselves, and en-
385 dorsed and delivered to said Barnes, who held and owned the same until about the last of June, 1874, when he sold and delivered the same for value to the complainant.

To secure the payment of this note, and one for the same amount which fell due a year previous, and which has been paid and satisfied, the defendants executed a mortgage upon the property so purchased, which was executed and recorded on the 20th Feb'y, 1866, and described in said mortgage.

That at the time said contract was made it was agreed and understood between the parties that the deferred payments were intended by said Barnes as an investment, and that so long as the interest was paid after this note became due, that the payment of the principal sum would not be demanded. and that in pursuance of said agreement and understanding the defendants paid up the in-
386 terest, and which was endorsed upon the note or paid, to Sept., 1873. Some time after the maturity of the note, Barnes, as a condition for further indulgence, demanded of the defendants that they should execute their note falling due at a further period for the interest up to their maturity, equal to fifteen per cent. per annum, upon the note for $7,500, and also for the amount of money advanced by Barnes to pay the premiums upon the insurance policies, with fifteen per cent. interest added. These notes were drawn in New Orleans, made payable to order, and endorsed and delivered to Barnes. The last of these notes was dated May 12th, 1874, and made due and payable on the 14th day of September thereafter. These transactions all took place prior to the transfer of the note by Barnes to complainant, but were known to complainant at the time of his purchase.

At the time of the purchase of the note, complainant wrote
387 to the defendants, notifying them that he was the holder and owner of the note, and calling their attention to the continuance of the insurance upon the property; to this letter defendants replied on the 6th of July, acknowledging its receipt, but nothing more.

On Dec. 1st, complainant mailed a letter to defendants, informing them that he needed money; that the interest had been paid to the 1st of September before, and again urging funds to provide insurance on the property; defendants replied to this letter on the 8th December, stating that they were willing to pay three months' interest, but had been served with a writ of garnishment in the suit of the First National Bank of New Orleans, in a suit by attachment brought by the Bank on said Barnes in the circuit court of Harrison county, and therefore declined to make further payment, or for further insurance, stating that they desired to have the insurance changed, and to take it at a future time.

388 On March 2d, 1876, complainant again wrote to defendants, calling their attention to the want of insurance, in

which he uses the following language: "I think it would not be wise for you, or safe for me, to leave things in that way; *the amount you owe me on the* $7,500 *note is too large to be left in such an unprotected condition, and I cannot consent to it.*"

On the 9th of March, 1876, the defendants made and sent to the complainant the following reply to the foregoing letter:

"Yours at hand, we do not want to insure any until about July, when we expect to insure for about $15,000. *We think you will run no risk in that time, as the property would be worth the amount due you if the building was to burn down.*"

(Signed) J. D. MAYER & CO.

The suit of the Bank *vs.* Defendants, was commenced in
389 Nov. 1874, but owing to the death of Barnes, was continued until the 24th Oct., 1876, when the defendants filed their answer to the garnishment, in which they acknowledge the execution of the note, but claim that they have paid excess of interest and usurious interest thereon, which should be deducted from the note, and which when done would only leave a balance of $2,509.76, and which was owing to said William Barnes, but claimed the benefit of the statute of limitations, and which they set up as an entire defence to the said note, and upon which the suit was dismissed as to them.

After this, by an arrangement between them and the bank, they gave their note to the bank for the said sum of $2,509.76, at four years with 6 per cent. interest, but this was done with the condition that if the complainant recovered on said note for $7,500, the bank was not to collect the note so executed to it. These are
390 about all the facts that need be stated to an understanding of the questions presented for decision.

The defences are: first, the statute of limitation of six years, and secondly, the deduction of excessive and usurious interest. The solution of both of these questions depends very much upon whether the contract is to be governed by the law of Louisiana when it was made, or by the law of Mississippi, where the defendants reside, and where the contract is sought to be enforced by a foreclosure of the mortgage. The proper determination of this question is not without difficulty. Had the note stipulated the place of performance there would be none. The general rule is, that the laws of the place where the contract was made is to govern unless its execution is stipulated or understood by the parties to
391 be in another State. The note was executed in New Orleans, where Barnes, to whom the note was endorsed and delivered, resided, and where he continued to reside up to the time of his death, and where doubtless it was expected, at the time the note was executed, it was expected he would continue to reside; so far as the proof shows, all the payments of interest that were made, and notes to secure the same, were made and executed in New Orleans, which is persuasive evidence that the parties contemplated that the

cent. interest thereon until due and ten per cent. thereafter until paid, which note was made payable to themselves, and en-
385 dorsed and delivered to said Barnes, who held and owned the same until about the last of June, 1874, when he sold and delivered the same for value to the complainant.

To secure the payment of this note, and one for the same amount which fell due a year previous, and which has been paid and satisfied, the defendants executed a mortgage upon the property so purchased, which was executed and recorded on the 20th Feb'y, 1866, and described in said mortgage.

That at the time said contract was made it was agreed and understood between the parties that the deferred payments were intended by said Barnes as an investment, and that so long as the interest was paid after this note became due, that the payment of the principal sum would not be demanded, and that in pursuance of said agreement and understanding the defendants paid up the in-
386 terest, and which was endorsed upon the note or paid, to Sept., 1873. Some time after the maturity of the note, Barnes, as a condition for further indulgence, demanded of the defendants that they should execute their note falling due at a further period for the interest up to their maturity, equal to fifteen per cent. per annum, upon the note for $7,500, and also for the amount of money advanced by Barnes to pay the premiums upon the insurance policies, with fifteen per cent. interest added. These notes were drawn in New Orleans, made payable to order, and endorsed and delivered to Barnes. The last of these notes was dated May 12th, 1874, and made due and payable on the 14th day of September thereafter. These transactions all took place prior to the transfer of the note by Barnes to complainant, but were known to complainant at the time of his purchase.

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390 about all the facts that need be stated to an understanding of the questions presented for decision.

The defences are: first, the statute of limitation of six years, and secondly, the deduction of excessive and usurious interest. The solution of both of these questions depends very much upon whether the contract is to be governed by the law of Louisiana when it was made, or by the law of Mississippi, where the defendants reside, and where the contract is sought to be enforced by a foreclosure of the mortgage. The proper determination of this question is not without difficulty. Had the note stipulated the place of performance there would be none. The general rule is, that the laws of the place where the contract was made is to govern unless its execution is stipulated or understood by the parties to
391 be in another State. The note was executed in New Orleans, where Barnes, to whom the note was endorsed and delivered, resided, and where he continued to reside up to the time of his death, and where doubtless it was expected, at the time the note was executed, it was expected he would continue to reside; so far as the proof shows, all the payments of interest that were made, and notes to secure the same, were made and executed in New Orleans, which is persuasive evidence that the parties contemplated that the

payments would be made there. In opposition to this view it is insisted that, as the note bears a greater rate of interest than was allowed by the laws of Louisiana, but allowed by the laws of Mississippi, that it is to be presumed that this was the State in which performance was contemplated, and that as the mortgage given to secure its payment, the contract must be held as contemplating its performance or enforcement under the laws of this State;
392 to this last proposition the answer is that the mortgage is only an incident to the contract; taking all the circumstances connected with the contract and its performance, so far as any has been had, the preponderance is in favor of holding it a Louisiana contract, and governed by the laws of that State. Whilst this is so, the statute of limitations of this State must be applied unless it has been waived, or such other action had by the defendants so as to take it out of the statute, or to estop the defendants from setting it up. Were it not for the peculiar requirements of our statute of limitations to take a case out of its operation, there would be no difficulty.

Section 2165, revised code of 1871, provides that in actions of debt assumpsit, or on the case founded upon any contract note, acknowledgment or promise shall be evidence of a new or
393 continuing contract whereby to take any case out of the operations of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment, or promise be made or contained by, or in some writing signed by, the party chargeable thereby the construction given to this provision of the statute by the supreme court of this State is, that such writing must specify the debt with acknowledgment of its being a legal and subsisting obligation, and one which the obliger intends to pay, expressed or implied. See E. K. Ford *vs.* Evans, 56 Miss., 18; Trustees *vs.* Geldman, 55 Miss., 152. It is contended by complainant's counsel, that the letter of defendants dated March 9th, 1876, above stated, in reply to the letter of complainant of the 2d of the same month, is a compliance with this requirement of the statute, the latter letter clearly and unmistakeably states the note which he desired to be secured by the insurance policy, the reply as certainly refers to the same note, and states that the property
394 would be worth *the amount due you*, if the building was to burn down. These two letters must be construed together as parts of the same written understanding between the parties; such is the rule with regard to all written contracts, and I can see no reason why this shall be an exception to the rule. Such being the case, I am of opinion that this correspondence taken together is an admission on the part of the defendants that the note mentioned in it, was a valid note, and acknowledgment that the amount remaining due upon it would be paid, if not otherwise by sale of the mortgage premises, and sufficient to take the case out of the statute of limitations for such balance.

I am further of opinion that although the notes given for the pay-

ment of the interest might have been avoided in the hands
395 of Barnes, or one holding with a knowledge of their consideration, yet in the hand of a *bona fide* purchaser, under the law of Louisiana, they formed such a consideration as would have stayed Barnes from an enforcement of the collection of the $7,500 note until after the interest note became due and payable, and thereby the prescription was arrested. From the testimony, these notes commenced being issued before the bar attached and were kept up without a breach until the 4th of September, 1874, less than six years before the commencement of this suit, and taking the letter of the 9th March, 1876, as the time when the statute last commenced running, only three years nine months and twenty days had elapsed before the filing of complainant's bill and the issuance of process thereon, so that if I am correct in either position this defense must fail.

This brings us to the second defense the claim of usury.
396 The contract being held to be governed by the laws of Louisiana these laws must be applied to this defense as well as any other growing out of the contract itself.

The note stipulated for six per cent. per annum until its maturity, and after that time until paid at the rate of ten per cent. per annum. The rate of six per cent. at the date of the contract was within the sum allowed by the laws of that State as conventional interest, and which, having been paid, this part of the interest need not be further considered.

The law, as then in force, limited conventional interest to eight per cent., and for contracting for a higher rate of interest, imposed a penalty of a forfeiture of the entire interest contracted for. See Civil Code of Louisiana, page 338, art 2895.

To avoid the penalty claimed it is insisted that the ten per
397 cent. stipulated for after the maturity of the note was not intended as interest but as a penalty for non-payment of the principal after maturity; and decisions of the supreme court of several of the States are relied upon as sustaining this position.

It is further insisted that interest can only be recovered for the loan of *money* or personal property, and that the defense for usury can only be set up for excessive interest on such loan and not for delay in payment for real estate, that such interest contracted for is part of the purchase money and recoverable.

Without stopping to inquire whether these positions are correct or not, I am satisfied that the ten per cent. in this case was intended and understood between the parties as interest, and not as a penalty or part of the purchase price. The bill alleges and all the circumstances go to establish the fact that this interest was in-
398 tended as an investment by Barnes at the time the contract was made, and that it was understood between the parties that payment of the principal of the note would not be demanded so long as the interest was promptly paid.

Afterwards, Barnes, as a condition for further indulgence, de-

manded that defendants should execute their negotiable notes for the pre-payment of the interest at fifteen per cent.

This was in effect the same thing as a loan of the money until the maturity of the interest notes.

The act of 1844 referred to has not been changed by subsequent legislation so far as it relates to the usurious interest contracted for to be paid after the maturity of the note as in the present cases. See Crane *vs.* Beaty, 15 Annual, 329; Campbell and Strong *vs.* Hilliard, same book, 537, and Weaver *vs.* Kaney and Blaine, 17 Annual, 326. The result is that the entire interest contracted
399 to be paid after the maturity of the note must be disallowed.

It is insisted for defendants that the interest paid after the maturity of the note being usurious must be set off against the amount of the note. This is resisted by complainant for the alleged reason that the laws of Louisiana limit the action for usurious interest paid to twelve months from the time of payment. Were this claim regarded purely as a counter demand by way of set-off, it would be barred by the laws of the State with perhaps the exception of the payment made by the note executed in May, 1874.

This defence being governed by the laws of this State, and not those of Louisiana.

But the payments being made to Barnes and being illegal, a court of equity will apply them to the payment of the principal at the dates at which they were made, in the same way that they
400 would have been made had Barnes now been living, and the claimant in this cause; and for the reason that the note was over due when purchased by complainant, besides his having had actual knowledge of everything connected with the execution of the note and the payment of the interest, he took the same, subject to all the equities, payments, and set-offs against it when he received it.

The result of the whole case is that there must be a reference to a master to ascertain the amount of the usurious interest so paid upon the notes, and deducted the same from the $7,500, and then estimate the interest upon the balance found at the rate of five per cent., from the 29th day of December, 1879, up to the time of stating the account, and for the balance found, together with such interest, the complainant will be entitled to a decree to be paid
401 within —— days, and in default the mortgaged premises will be sold, and the proceeds applied to the payment thereof.

R. A. HILL, *Judge.*

402 UNITED STATES OF AMERICA, *Southern District of Mississippi,* } *S. C.:*

I, James M. McKee, clerk of the circuit court of the United States for said district, hereby certify that the preceding annexed 401 pages, contain a true and complete transcript of the record of said

court, in the cause therein stated, as the same now remains in our said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said court, at office, in Jackson, in said district, this 24th day of March, in the year of our Lord 1881.

[SEAL] JAMES M. McKEE, *Clerk.*

Cl'ks fee for transcript $75.00.
Paid by Wm. Walsh.
J. M. McKEE, *Clerk.*

SOUTHERN DISTRICT OF MISSISSIPPI, *S. C.:*

I, —— ——, judge of the United States for said district, hereby certify that —— ——, whose genuine signature appears to the above attestation was at the date thereof, and yet is, clerk of said court, duly appointed and qualified as such; that his signature thereto is genuine; and that said attestation is in due form, and by the proper officer.

Given under my hand and private seal, (having no official seal,) at ——, this —— day of ——, A. D. 187 , and of our Independence the one hundred and ——.

—— ——.

403 Pleas and proceedings had and done at an adjourned term of the circuit court of the United States for the southern district of Mississippi, begun and held at Jackson, in said district, on the fourth Monday, being the 23d day of January, A. D. 1882. Present and presiding, the Honorable Robert A. Hill, U. S. district judge for Mississippi.

WM. WALSH
vs.
J. D. MAYER & Co. } 297. In Equity.

Be it remembered, that on the 9th day of February, A. D. 1882, the defendants herein, filed in the office of the clerk of said court their petition for appeal, which is in words and figures following, to wit:

UNITED STATES OF AMERICA, *Southern District of Mississippi.*

In the Circuit Court of the United States for the District aforesaid.

To the judges of said court:

The petition of J. D. Mayer, Charles T. Mayer, Henrietta Polydore, and Roderick Seal, Union National Bank of New Orleans, William B. Schmidt, and Francis M. Zeigler, respecively show that on the 12th day of Feb'y, 1881, in a certain cause theretofore pending in said court wherein William Walsh, a citizen of Louisiana, was complainant in a bill in equity, and the defendants, J. D. Mayer, Charles T. Mayer, Henrietta Polydore, and Roderick Seal, citizens of
404 Mississippi, residing in the district aforesaid, were defend-

ants, by due service of process, and the said Union National Bank, and William B. Schmidt, and Francis M. Zeigler, firm of Schmidt & Zeigler, being interested in the subject-matter of the suit, came in voluntarily to defend, a final decree was rendered by the said court against J. D. Mayer & Company, that they pay the sum of 750 dollars to complainants, and in default that certain property, in which the complainants alleged demand, was secured by mortgage, should be sold to satisfy said decree. The said other defendants were creditors of said J. D. Mayer & Company, secured by subsequent mortgages on the same property. The amount in controversy greatly exceeded the sum of $5,000, and the said complianant claims in the controversy a sum much larger $5,000, which the defendants resist. The petitioner further shows that one principal ground of defence which is set up in the answers of the defendants was that by the law of Mississippi the entire claim of complainants was barred by the statute of limitations of six years, and so they here insist, and that no decree for any sum should have been rendered against them; and also other grounds affecting the right of the complainants to any decree for any sum.

405 These grounds were, by the court in its final decree, expressly overruled, all of which by record appears. The defendants, therefore, feeling aggrieved by the decree, and the same being in a controversy not yet decided because of the appeal of the complainants heretofore granted and now pending in the Supreme Court of the United States, wherein the complainants ask for a decree for more than five thousand dollars, these petitioners, to save their right to a reversion of the decree as rendered against them, pray that an appeal be granted them to the next term of the Supreme Court on their, or some of them, executing bond for such sum as the court may require, no supersedeas being asked.

JOHN D. MAYER,
CHAS. F. MAYER,
HENRIETTA POLYDORE,
And RODERICK SEAL,
UNION NATIONAL BANK.

WILLIAM B. SCHMIDT & FRANCIS M. ZEIGLER,
Firm of Schmidt & Zeigler,
By W. P. & J. B. HARRIS, *Sol'r.*

406 And thereupon the following order granting the appeal prayed for was made and entered in the minutes of said court, as follows:

Circuit Court of the United States, for the Southern District of Mississippi.

WILLIAM WALSH
vs. } 297. In Equity.
J. D. MAYER & Co.

This day came the defendants and filed their petition praying the

allowance of an appeal to the Supreme Court of the United States from the decree heretofore entered herein on the 12th day of Feb'y, 1881; and it having heretofore been found by the court that the matter in controversy in this case exceeds the value of $5,000, it is ordered that said appeal be and the same is hereby allowed by the court, and order defendants to give good and sufficient security to prosecute his said appeal to effect and answer all damages and costs if he fail to make his appeal good in the sum of five hundred dollars; and it is also ordered that a citation issue to the defendants, returnable according to law.

407 And afterwards, to wit, on the 7th day of March, 1882, an appeal bond was filed in words and figures following, to wit:

Know all men by these presents that we, John D. Mayer, Charles F. Mayer, Henrietta Polydore, constituting the firm of J. D. Mayer & Co., William B. Schmidt, and Francis M. Zeigler, trading as Schmidt and Zeigler, and the Union National Bank of New Orleans as principal, and W. S. Benedict as security, are held and firmly bound unto William Walsh in the sum of five hundred dollars, the payment of which, well and truly to be made, we bind ourselves and each of us, and our administrators, heirs, and assigns, &c., jointly and severally by these presents, sealed with our seals, and dated this 24th day of February, A. D. 1882.

The condition of this obligation is such that whereas the said John D. Mayer, Charles F. Mayer, Henrietta Polydore, constituting the firm of J. D. Mayer & Co., William B. Schmidt and Francis M. Zeigler, trading as Schmidt & Zeigler, and the Union National Bank of New Orleans, having prayed for and obtained an appeal to the Supreme Court of the United States from a final decree of the circuit court of the United States, for the southern district of Mississippi, in a certain cause wherein Wm. Walsh was complainant, and that the present appellants were parties defendant,

408 being No. 297, in the docket of the said court, which decree was rendered on the 12th day of February, 1881, condemning the defendants to pay the sum of seven hundred and two $\frac{69}{100}$ dollars, with interest and costs of suit, within thirty days from date, &c.

Now then, if the said John D. Mayer, Charles F. Mayer, Henrietta Polydore, constituting the firm of J. D. Mayer & Co., William B. Schmidt and Francis M. Zeigler, trading as Schmidt and Zeigler, and the Union National Bank of New Orleans, shall well and truly abide by and perform such decree as said Supreme Court of the United States shall render in the premises, then this obligation to be void, otherwise to remain in full force and virtue.

W. S. BENEDICT. [SEAL.]

STATE OF LOUISIANA, *City of New Orleans:*

Before me, the undersigned authority, personally came and appeared the above security, named W. S. Benedict, and well and personally known to me as such, who being duly sworn, declares

and says that on this day he signed, sealed and delivered the above obligation for the purposes therein mentioned; that he resides in this city permanently; that he is worth over and above the payment of all his debts the sum of five hundred dollars, and has unencumbered real estate more than sufficient to cover the same.

In witness whereof, I have hereunto set my hand and official seal, this 24th day of Feb'y, A. A. 1882.

WILLIAM GRANT, [SEAL.]

409 *Commissioner of the United States Circuit Court for the 5th Circuit and Eastern District of Louisiana.*

The foregoing bond and surety is approved this Feb'y 27th, 1882.

R. H. HILL, *Judge, &c.*

And on March 7th, 1882, the following citation and affidavit thereon were filed in this court, as follows:

United States of America to William Walsh, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2d Monday of October next, pursuant to an appeal granted by the circuit court of the United States, for the southern district of Mississippi, wherein John D. Mayer & Co., are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said order of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf, and the appellants have filed

410 their appeal bond in the clerk's office of said court.

Witness the Honorable R. A. Hill, district judge, presiding in the circuit court of the United States for the southern district of Mississippi.

On this 7th day of March, A. D. 1882, personally appeared J. B. Harris, before the subscriber, clerk of the circuit court of the United States for the southern district of Mississippi, and makes oath that he delivered a true copy of the within citation to W. L. Nugent, Esq., attorney of record for William Walsh, on this the day above written.

J. B. HARRIS.

Sworn to and subscribed before me, this 7th March, A. D. 1882.

JAS. M. McKEE, *Clerk.*

411 UNITED STATES OF AMERICA, } *s. c.:*
Southern District of Mississippi, }

I, Jas. M. McKee, clerk of the circuit court of the United States for said district, hereby certify that the preceding annexed eight pages, contain a true and complete transcript of the petition for appeal, order granting same, appeal bond and citation in the cause therein stated, as the same now remains in our said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said court, at office, in Jackson, in said district, this 11th day of March, in the year of our Lord, 1882.

[SEAL.] JAS. M. McKEE, *Clerk.*

SOUTHERN DISTRICT OF MISSISSIPPI, *s. c.*:

I, ———, judge of the United States for said district, hereby certify, that ———, whose genuine signature appears to the above attestation, was at the date thereof, and yet is, clerk of said court, duly appointed and qualified as such; that his signature thereto is genuine, and that said attestation is in due form, and by the proper officer.

Given under my hand and private seal, (having no official seal.) at ———, this —— day of ———, A. D. 187 , and of our Independence the one hundred and ———.

Endorsed on cover: S. Mississippi. C. C. U. S. No. 239. William Walsh, appellant, *vs.* J. D. Mayer, C. F. Mayer, and Henrietta Polydore, as J. D. Mayer & Company, the Union National Bank, *et al.* Filed 26th April, 1881. And No. 507. (Cross appeal.) J. D. Mayer, C. F. Mayer, and Henrietta Polydore, as J. D. Mayer & Co., *et al.*, appellants, *vs.* William Walsh. Filed 21st March, 1882.

111-31

Supreme Court of the United States.

OCTOBER TERM, 1883.

WILLIAM WALSH, APPELLANT,

vs.

J. D. MAYER & CO., AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Argument of William L. Nugent, for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1883.

WILLIAM WALSH, APPELLANT,

vs.

J. D. MAYER & CO., AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Argument of William L. Nugent, for Appellant.

STATEMENT OF THE CASE.

On the 2d of January, 1866, at New Orleans, La., John D. Mayer, Charles I. Mayer and Henrietta Polydore, made their promissory note in writing of that date, and thereby, then and there, two years after date, promised to pay to the order of themselves $7500 for value received, with interest from date to maturity at six per cent, and after maturity until paid at 10 per cent., and endorsed in blank and delivered the same to William Barnes. In June, 1874, Barnes sold the note to appellant for $6,800. MSS. Record, 202. This note, with another, was given for the purchase money of the Barnes Hotel property, situated in Harrison county, Mississippi. To secure the payment of these two notes, the purchasers gave trust deed upon the property to Roderick Seal, trustee, and invested him with the power of sale on default in the payment of the notes. This trust deed was duly executed in the State of Mississippi, delivered and recorded, and remains unsatisfied of record. Barnes, who had constructed the hotel, intended the notes thus executed and secured as permanent investment of that amount

of money in Mississippi mortgage securities, and, as part of the contract of sale and purchase, it was well understood and agreed that if the purchasers, John D. Mayer & Co., were unable to meet the notes as they matured, they were to have indulgence extended to them so long as they desired on payment of the interest annually due upon the note at 10 per cent. per annum. The first note was paid, but the last was never paid, and forms the basis of this suit.

The appellees, Mayer & Co., being thus in default, Barnes demanded payment of the note and threatened foreclosure proceedings if the same, or the interest upon it, was not paid up according to the agreement of the parties. Mayer & Co. endeavored to get a loan for this purpose but failed, and, in their dilemma, proposed to Barnes that if he would not foreclose they would give him their *small notes* for an amount equal to fifteen per cent. per annum of the large note for $7,500 which he could put on the market and thus raise enough to cover interest To this Barnes assented. The small notes were given from year to year; they were sometimes discounted or sold, and sometimes not, according to the varying necessities of the holder. Barnes, carrying out the agreement, did not foreclose or demand payment of his large note, on which the interest was paid in the manner indicated up to September, 1874, the last endorsement on it being in these words: "New Orleans, September 1, 1874, interest on the within note paid in full to date. Wm. Barnes." I omitted saying that, under the contract, Barnes was to advance the money to pay the premiums of fire insurance on the hotel buildings and that this advance was, also, added to the interest and the small notes made to cover and raise it as indicated above. The only one of these small notes that could be obtained is attached to the answer of Mayer & Co., and runs thus:

$693.75. NEW ORLEANS, May 12, 1874.

On August 1st, after date, we promise to pay to the order of William Barnes, *Five* hundred and and ninety-three and seventy-five one hundredths dollars, value received.

_____." MSS. Rec. 154.

This note, with another of the same amount due in September, 1874, was accepted by Barnes in full payment of interest on the large note up to September, 1874, and the fire insurance premiums advanced by him, and the two small notes were sold to appellant by Barnes when the large note was purchased. This large note is in the following words and figures:

$7,500. NEW ORLEANS, January 2, 1866.

Two years after date we promise to pay to the order of ourselves, seven thousand, five hundred dollars and no cents, for value received, with interest at the rate of six per cent. per annum from date until maturity, and ten per cent. from maturity until final payment.

J. D. MAYER,
C. F. MAYER,
HENRIETTA POLYDORE.

At the time of his purchase, appellant was fully informed of the agreements between the parties, and agreed to continue it. The small notes were paid to him; the large note was not paid. A correspondence ensued between him and the makers of the note in the course of which, as we contend, they distinctly recognized and promised in writing to pay the debt. Indeed, there was no hesitation on this subject until Mayer & Co. were garnisheed as debtors of Barnes, when they declined payment until the attachment proceedings against Barnes by the Union Bank of New Orleans were terminated. In their answer, filed as garnishees, Mayer & Co. claimed a reduction of their principal debt because of payment of interest exceeding that allowed by the laws of Mississippi, and finally, by an arrangement with the bank, gave their note and mortgage for an amount much less than the principal of the amount in controversy. The appellant was not impleaded in this attachment proceeding and cannot be affected by it, and Mayer & Co. knew when they were garnished that appellant was the holder and owner of the note now in controversy.

It is proper, also, to state, that when they purchased the "Barnes Hotel," at Mississippi City, Mayer & Co. had just left Arkansas, and bought it for the purpose of making it their permanent residence. Their expectation was to complete payment of the purchase money out of the profits realized from this sea-side hotel to be kept by them, while they secured all the time deemed necessary by the agreement for extension and delay on the payment of interest. Indeed, the delivery of the small notes effected this result from year to year.

The court below held that the notes were Louisiana contracts; that the interest collected being in excess of that allowed by law forfeited, by operation of law, all interest; and that the appellees, Mayer & Co., had the right, in this proceeding, to apply all the interest paid to the reduction of the principal debt, as to which the plea of the statute of limitations was overruled. We, therefore, were limited in our recovery to a few hundred dollars, and insist that the court was wrong. If the contracts were all Louisiana contracts we claim that the appellees, Mayer & Co., were cut off, by lapse of time, from demanding, in this way, a return of interest paid, and that the execution and delivery of the *small notes* relieved the transaction of all usurious taint. In this view we made a motion to correct the decree of the court based upon its conclusion as to the law governing the case so as to give us the whole amount claimed, which was denied—improperly as we think. No notice was taken of the fact that the *small notes* were not money or interest taken and received, and that, in no event, could appellant be required to account for more money than was realized by Barnes upon them. The argument following embodies our views of the whole case.

ARGUMENT.

Prior to the adoption of the Code of 1857 there was no sta
ute in Mississippi prescribing the duration of a mortgage lie
Morse vs. Clayton, 13 S. and M., 381. That Code effected
radical change in the law of mortgages, by declaring that, be
fore a sale under a mortgage or deed of trust, the mortgager o
grantor shall be deemed the owner of the legal title of the prop
erty conveyed in such mortgage or deed of trust, except a
against the mortgagee and his assigns, or the trustee, afte
breach of the condition of such mortgage or deed of trust; an
that no action, suit or other proceeding shall be brought or ha
upon any mortgage or trust deed to recover the sum of mone
secured thereby, but within the time allowed for the commence
ment of an action at law upon the writing in which such sur
of money may be specified. And in all cases when the remed
at law to recover the debt shall be barred, the remedy in equit
on the mortgage shall be barred; Revised Code of Mississippi
1857, pp. 308, 399; Revised Code of Mississippi, 1871, §§ 2,293
2,173; Revised Code of Mississippi, 1880, §§ 1,204, 2,667.

The Supreme Court of Mississippi, construing this statute
say: "In this statute the Legislature has incorporated th
equity doctrine that a mortgage is a mere security for the debt
and that, until a sale under it, the mortgagee continues the rea
owner of the property. The equity of redemption is considered
to be the real and beneficial estate, tantamount to the fee a
law, and it is accordingly held to be descendible by inheritance
devisable by will and alienable by deed. As between the
mortgagor and mortgagee, the fee of the estate passes to the
mortgagee at the execution of the deed. This is necessary to
enable him to guard and protect his security. * * * * I
has become well settled in courts of common law that the
mortgagee, until foreclosure, has only a chattel interest; that the
mortgage is but a charge on the land, and that whatever would
give the money will carry the estate in the land along with it
to every purpose. The estate in the land is the same thing as
the money due upon it. It will be liable to debts; it will go to
executors; the assignment of the debt will draw the land after
it. The mortgagee's estate is not *in the land*, but in the secu-
rity only. The debt is considered as the principal, and the
mortgage as an incident only. * * * * The mortgagee
* * * * * has but a chattel, and the mortgage is only a secu-
rity. * * * * In order to render the pledge available, and
give him the intended benefit of his security, the interest of the
mortgagee is considered as real property, to enable him to
maintain ejectment for the recovery of the possession of the
land mortgaged. It is only considered as real estate for the
purpose of enabling the mortgagee to get it in possession.

When contemplated in every other point of view it is personal property."

Carpenter v. Bowen, 42 Miss., 48, 49, 50;
Buckley v. Daley, 45 Miss., 338;
Buck v. Payne & Raines, 52 Miss., 271;
Helm v. Gray, 59 Miss., 54.

This modification of the old law does not militate against the well settled rule that the mortgage secures the *debt* and not the note or bond evidencing the debt, and that the statute of limitation does not discharge the debt or extinguish the right, but takes away the remedy. 2 Jones on Mortgages, §§ 924, 1,203. When it is said that the mortgage is an *incident*, it was not intended that, if executed in this State in furtherance and consummation of a contract made in another, its validity, operation and discharge should be subservient to the laws of the place of the contract, as we shall hereafter see.

The trust deed in this case stands upon the same footing with a mortgage. *New Orleans v. Montgomery*, 95 U. S. 16; *Clarke v. Wilson*, 53 Miss., 129. And in view of the cross appeal it becomes necessary to determine the law by which the rights of the parties are to be settled.

J. D. Mayer & Co., citizens of Arkansas, purchased from Wm. Barnes, a citizen of Louisiana, the hotel property situated in Mississippi, intending at the time to reside permanently in Mississippi and conduct the hotel and out of the income therefrom to pay the purchase money represented by the notes. The execution of the trust deed was the completion or confirmation of the original contract, and the purchasers were to have indulgence, after maturity of the notes, on the payment of interest annually thereon at the rate of ten per cent. per annum.

The note in suit is dated thus: "New Orleans, January 2, 1866," and is payable generally. The trust deed given for the purchase money of the property not paid in cash, is dated "————————, February 20, 1866," was acknowledged before the Probate Clerk of Harrison county, Mississippi, on the eighth of May, 1866, was duly recorded and remains unsatisfied so far as the books of registration show. The small notes, given to be sold in open market and the proceeds to be applied to pay interest on the note for $7,500 and the premiums for insurance on the property, were dated at New Orleans and payable generally. At the time they were executed J. D. Mayer & Co. were and they still are citizens of Mississippi.

The defense, at the argument, but not in the pleadings, was that the original transaction, and the new small notes, were usurious contracts, and that the laws of Louisiana are to govern and control in the disposition of the case. Is that true? I presume there can be no better general rules applicable to the case than these: If a contract is entered into in one country to be performed in another, and the rate of interest differs in the two countries, the parties may stipulate the rate of interest of either

country, and thus, by their own express contract, determine with reference to the law of which country that incident of the contract shall be decided. If the contract so entered into stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear the parties intended to contract with reference to the law of some other place. The law of the place where the contract is made is to determine the rate of interest where the contract specially gives interest; and this will be the case though the *loan be secured* by a mortgage on lands in another State, unless there be circumstances to show that the parties had in view the law of the latter place in respect to interest. When that is the case the rate of interest of the place of payment is to govern.

Story's Conflict of Laws, §§ 304, 305 b;
2 Kent's Com., 3d Ed., 460, 461;
D'Wolf v. Johnson, 10 Wheat. 367.

In all cases, however, the real intentions of the parties must control, and their acts are expressive of their intention. Thus where a citizen of New York borrowed money in England, upon the security of a bond and mortgage in New York at the legal rate of interest of that State, it was held that the mortgage, executed in New York and upon property there situated, being valid by the *lex situs*, which was the law of the domicile of the mortgagor, it was the duty of the court to give effect to it, without reference to the usury laws of England. *Chapman v. Robertson*, 6 Paige, 627-633. This case has been criticised as well as approved; but it seems to me to announce a correct conclusion of what ought to be the law, if the effort be to maintain, instead of by astute reasoning, to nullify contracts fairly entered into and honestly intended at the time to be faithfully performed.

Miller v. Tiffany, 1 Wall 310;
Cromwell v. County of Sac, 96 U. S., 62.

The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. This, Judge Story says, has uniformly been recognized as the correct exposition in the common law. And where the contract is, either expressly or tacitly, to be performed in any other than the place where it is entered into, the rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance.

Story's Conflict of Laws, §§ 280, 281;
Andrews v. Pond, 13 Peters, 65;
Cockle v. Flack, 93 U. S., 347.

In cases of a mixed nature it is often a serious question which rule ought to prevail, the law of the place where the contract is made, or that of the place where it is to be performed; and Hertins, as quoted by Judge Story, says,

that when a contract made in one place is confirmed in another, the law of the latter place will govern, if the confirmation is to give greater weight to the contract. I suppose this rule is adopted in furtherance of the proposition that parties must always be presumed to have intended to make a legal contract.

Story's Conflict of Laws, §§ 282, 286 a.;
Martin vs. Martin, 1 S & M., 177, 178;
Ewing vs. Howard, 7 Wall. 499;
Steele vs. Andrews, 19 N. J. Eq., 409;
Hogg vs. Ruffner, 1 Black, 115;
Tously vs. Robinson, 1 Metc., (Ky.) 663.

The question involved in this suit was discussed in *Townsend v. Riley*, 46 N. H., 300, and the court sustained the contract as impeached by the answer for usury. One of the Judges said: "Cases can be readily conceived where it might be difficult to determine whether the parties had reference to the laws of the place where the contract was made, or of some other place, as when the bargain is made in one State for the sale of lands there situate, and consummated in another by executing the deed and taking back the mortgage for the piece, or where it is left doubtful, whether the money is to be paid at the domicile of the promisor or promisee in another State. In such cases it is desirable that the parties should be at liberty to determine by express stipulation, made in good faith, by which law the rate of interest should be governed." He, hence, concluded that, if a contract was made in New York for interest legal there, whether such interest was payable in New Hampshire or not, it is not affected by the usury laws of the latter State.

Balner v. Wombough, 38 Barb., 352.

In Van Schaick v. Edwards, 2 Johns, Case 355, A, resident in Massachusetts and owning lands in New York, sold them to B, a resident of New York. B gave his bond for the purchase money payable in four years, and four notes, *payable at one, two, three and four years respectively*, for interest on the principal sum, at six and a half *per cent.* per annum, and A executed bond to B to make him a deed on payment of the purchase money bond and the four notes. To an action on three of the notes B pleaded usury; but the plaintiff had judgment.

Radcliffe, J., recognizing the general rule, said: Circumstances may exist, arising from the situation of the parties, the nature of the transaction, or the object of the contract, to vary the rule; and stated, that the place where the security is to be taken, justified a deviation from the rule, the taking of the security being part of the contract, which was executory until that was done. 359.

Kent, J., differed, but admitted that when the parties in the execution of the contract, had a view to the laws of another State, the contract must be governed by such foreign law. 367.

Lansing, C. J., concurred with Lewis, J., that the notes were

part of the price for the land and *were not usurious*, and that the plaintiff was entitled to judgment. 370.

See: *Defau v. Humphreys*, 20 Martin, La., 1.
The Confederate Note Case, 19 Wall, 559.

In view of all the authorities, I do not well see how the original contract could be regarded otherwise than as a Mississippi contract. The note for $7,500 was executed in Louisiana, and payable generally. It was given in part for the purchase money of the Barnes Hotel property situate in Mississippi, and, by the very terms of the contract of sale, was to be secured by a trust deed on the property to be thereafter executed. This trust deed was executed and acknowledged in Mississippi, on the 20th day of February, 1866, in accordance with the contract, and was the final consummation of a contract before that time executory. The note expressly stipulated for *ten per cent.* after its maturity in pursuance of the agreement that the money, after the note matured, was to be an investment on mortgage security in Mississippi, to be continued as long as the interest was paid. This interest of ten per cent. was illegal by the laws of Louisiana and legal by those of Mississippi. Can it be doubted that the parties contracted, as to interest, with reference to the laws of Mississippi? Does not the case of *Defau v. Humphreys*, *supra*, absolutely justify the making of the contract if there were no other cases to sanction it? The presumption is that way.

Brown v. Freeland, 34 Miss., 214.

I have considered the question upon the idea that the defendants had fairly pleaded usury and were entitled to offset it; but such is not the case. The answer of the principal defendants alleges that the interest payments, represented by the small notes, were independent arrangements, and that the policy of Barnes was, to have it in his power; *always to rely upon and enforce the original note according to its terms, unfettered by the usurious interest notes.* And further, that Barnes knew that if he *sued on the original notes he would have to defend on its terms as to interest;*" and that "if the matter is to be reopened on the claim of said Walsh, the complainants, (defendants,) say they not only plead the statute of limitations, *but the statute of usury as a forfeiture of all illegal interest, and that the whole excess, paid on both notes after maturity, should be credited as payments on the note*" sued for. Again: "*they state that the object of Barnes in so entering credits was to carry out his plan, which was to have the note (sued for) unaffected by the usurious interest notes.*"

Schmidt & Zeigler assert the defences set up by J. D. Mayer & Co., and say "that whether the notes, principal note and interest note, or both, are governed by the laws of Mississippi, or those of Louisiana, though respondents insist as advised that those of Louisiana govern the contracts as to interest, that these respondents shall have the amount of usurious

interest paid, deducted from the alleged debt, or treated as payment *pro tanto*, and respondents further insist that the interest notes were utterly void."

The answers place the defence purely upon the *excess of interest* paid through the instrumentality of the *small* notes given to be sold for that purpose, and concede liability for the old note according to its terms. Upon this allegation the case was presented to the court.

Usury, as a defence, must be specially pleaded or set up in the answers of defendants, to entitle it to consideration, and it must be strictly proved. It is to be determined by the law of the place where the interest is payable. The intention of the parties is an ingredient in the offense and is to be considered by the court in reaching a conclusion.

Livermore v. Boswell, 4 Mass. 437;
Lloyd v. Scott, 4 Peters 205;
Bank of U. S. v. Waggoner, 9 Peters 378;
Ewing v. Howard, 7 Wall 499;
The Confederate Note Case, 19 Wall 548;
Tittle v Bonner, 53 Miss. 578.

When the answer alleges generally that the contract is usurious, without any more specific allegation, it must be intended that the defence is that the contract is in violation of the statutes of the State where the suit is brought, and to that objection alone the defence must be restricted. This rule was applied where the loan was effected and the contract made, in New York, and the mortgage securing the debt was executed in New Jersey, and a decree of foreclosure was entered accordingly.

Dolman v. Cook, 14 N. J. 56;
Atwater v. Walker, 16 N. J. Eq. 42;
Richards v. Wattleby, 5 Wis. 73;
Newman v. Kershaw, 10 Wis. 333;
Mesier v. Norton, 83 Ills. 519.

It is quite manifest, therefore, that the plea could only be available to assail the large note for $7,500 upon the idea that it was usurious by the laws of Mississippi. But that objection is obviated by the code of that State, which fixed the conventional rate of interest at *ten per cent.* per annum, and which forfeits only the *excess of interest paid.* The statute reads: "And if a greater rate of interest than ten per cent. shall be stipulated for in any case, such excess shall be forfeited on the plea of the party to be charged therewith."—Revisd Code of Mississippi, 1857, page 370.

The usury, if any, in this case should have been so pleaded that the complainant could have availed of the plea and taken judgment for all the balance of his debt. That was settled in *Tittle v. Bonner, Supra.* This, if properly done, would have entitled the defendants to an offset, by the course of chancery practice in Mississippi, to the extent of the amount paid in ex-

cess of the legal rate of interest in Mississippi. As there was no such plea we were entitled to a decree for our whole debt, if the statute of limitations did not present an insuperable barrier to a recovery.

Is this statute applicable to the case as presented and proven? The learned district judge who heard and determined the case, found, as a fact, that at the time the contract was entered into, it was agreed and understood between the parties that the deferred payments were intended as an investment by Barnes, and that so long as the interest was paid, after the note became due, the payment of the principal sum would not be demanded; that in pursuance of this agreement and understanding the defendants paid up the interest which was endorsed upon the note as paid to September, 1873, and no proceedings for foreclosure were instituted; that some time after the maturity of the last note Barnes insisted, as a condition for further indulgence, that defendants should execute their notes falling due at a future period, for the interest to their maturity, equal to fifteen per cent. per annum upon the note for $7,500, and for the amount expended for insurance premiums with fifteen per cent. added; that these notes were drawn in New Orleans payable to order and endorsed and delivered to Barnes; that the last of these notes was dated May 12, 1874, and was payable September 4, 1874, and that all the payments of interest were made in New Orleans. This latter statement is disproven by the depositions of Mrs. Davis and J. D. Mayer. Q. V. With this qualification, and the further statement the new notes were given to be *discounted in open market for the purpose of raising the arrearages of interest, and that some of them were so discounted*, the findings of fact are perhaps unobjectionable. Upon them we think the statute of limitations could not and did not apply to the large note. By a continuous course of dealing the creditor had accepted the debtor's negotiable notes as payment of interest, and could not have maintained a bill to foreclose the mortgage; and this was recognized by both parties as carrying into effect the original contract of sale and purchase. This express contract was brought to the notice of appellant when he purchased the notes sued for and paid a valuable consideration for the same. To hold that when appellees had given the small notes and they were negotiated, the appellant could, nevertheless, sue, seems to me to be quite against the current of authority. In the contemplation of the parties the large note was not due, nor could payment thereof have been demanded. Such an agreement would have discharged a surety and was equally efficacious in arresting the statute of limitations.

McComb v. Kellendge, 14 Ohio 343;

Smith v. Clopton, 48 Miss. 66;
Brown v. Prophet, 53 Miss. 649;
McLemore v. Powell, 12 Wheat. 557;
Peter v. Beverly, 10 Peters 568;
Lear v. Friedlander, 45 Miss, 567;
Myers v. Willis, 5 Hill, N. Y., 464;
Pike v. Crest, 62 Ills. 401;
Chaplin v. Currier, 49 Vt. 48.

A little elaboration on this point may not be unnecessary. There is no distinction in the law of limitations between voluntary and involuntary disabilities. Angell on Limitations, 478. In all cases there must be an existing right of action, a party capable of suing, and a defendant to be sued. If either incident fail the statute cannot be set in motion. If, by any valid contract, a note due to-day is extended for twelve months, it can in no wise be said that the holder is entitled to sue, or has an existing right of action. The right to sue may have arisen, and yet it may be parted with for a price, and if the agreement in that connection be fair there is no reason why it may not be enforced. In *Mattingly v. Boyd*, 20 Howard 128, it was held that the statute of limitations was suspended, and that the garnishee could not be sued pending the attachment suit. In *Myers v. Willis*, *supra*, the Court say "that the statement of the account, and taking the notes of Bostwick payable at a future time, suspended the claim upon the original consideration till the notes became due. Being negotiable they might be used more beneficially than the account. There can be no doubt of the intention to extend the time of payment." In answer to the suggestion that the giving of time did not operate as a suspension of the right to sue, the Court say: "But we are of opinion that this must follow any arrangement by which the debt it secured was, in any way, affected. As payment would discharge it, so suspension would postpone the remedy by suit."

I think the direct question involved was settled by the Supreme Court of Mississippi in *Brown v. Prophet*, *supra*. There it is said: "If the holder of a note due agrees with the maker of the note that he may retain the sum due for a definite time, upon his promise to pay usurious interest, and the maker agrees to keep said sum for such definite time, and to pay said interest, this arrangement will discharge a surety on the note not consenting to the forbearance. Although the usury cannot be collected, the legal rate can be; and the absolute right to get interest for a given time is a valuable consideration to uphold a promise to forbear, and to tie the hands of the creditor so that he cannot sue until the expiration of the time agreed on."

If mistaken in this view, the statute of limitations was not applicable because of the new acknowledgement or promise to pay. The words of the Mississippi statute are these: " * * No acknowledgement *or* promise shall be evidence of a new or

continuing contract, whereby to take any case out of the operation of the provisions of this act, or to deprive any party of the benefit thereof, unless such acknowledgement *or* promise be made, or contained by or in some writing, signed by the party chargeable thereby." Revised Code of Mississippi, 1857, p. 401, Art. 21; Code of 1871, § 2165. Construing this statute, the Supreme Court of Mississippi say that an acknowledgement that the debt is due and unpaid is sufficient to revive a cause of action barred, and may be effectual for the purpose though there be no promise to pay, or a promise which is insufficient, provided the acknowledgement be clear, distinct and unconditional; that the statute applies to debts barred as well as to those not barred; that the exact amount due need not be specified in the new promise; that it is sufficient if the particular debt be specified, its justice admitted and an intention indicated to pay it, though the expression of an intention to pay would not be necessary if the justice of the debt was clearly admitted without reservation; and that the amount due is, ordinarily, a mere matter of calculation.

Beasley v. Evans, 35 Miss. 197;
Hart v. Boyt, 54 Miss. 547.

In Trustees Canton Academy v. J. J. Gilman, 55 Miss. 148, it is said that the writing to have the effect of a *new promise*, or a waiver of the statute, must identify the debt to which it relates with such distinctness as to the amount due and the creditor that nothing important is left open to further testimony; but when the debt is specified as to the sum due and the creditor identified, the calculations of accumulations of interest is unimportant. *Eckford v. Evans*, 56 Miss. 25; 30 Miss. 171; 32 Miss. 237.

The letters copied into the bill come up fully to the requirements of the statutes of Mississippi as thus construed, and we call attention to them *seriatim*, so that they may be considered together.

In his letter of June 20, 1874, the appellant distinctly informed J. D. Mayer & Co. that he had become the owner of the notes involved in this cause, and gave so minute a description of the same that nothing is left open for explanation; the answer, signed by J. D. Mayer, acknowledges receipt of the letter and speaks of the note as "my note." On the 30th November, 1874, appellant wrote again to appellees, referring to the $7,500 note previously described, and stating that the interest had been paid to September, 1874, but he needed money, and wished to know what they proposed to do. On the 8th December, 1874, appellees answered and said they were quite ready to pay *three months' interest*, and would rather pay in that way than let it run on until the amount gets so large, but were served with a garnishment writ, and if they paid anything it would be at their risk. "Of course," they said, "we do not want to run the risk of paying twice." This reply referred,

also, to keeping up insurance on the property as a further security for the debt. On the 28th January, 1875, appellant again wrote appellees in reference to the insurance of the hotel buildings, saying, "in case of fire the insurance money would pay your debt, and you would own the property and could rebuild." He called for a description of the buildings, and J. D. Mayer, the manager and business man for the firm, replied, forwarding the sketch, and saying he wanted insurance changed so as to run for eighteen months.

On the 2d March, 1876, appellant again wrote to the appellees, stating that he did not agree with them as to the wish expressed, to leave the whole property without any insurance until the next summer, and using this language: "I think it would not be wise for you or safe for me to leave things in that way. The amount you owe me on the $7,500 note is too large to be left in such an unprotected condition, and I cannot consent to it. When the policy in the Firemen's office is out I shall insist on a renewal, and if necessary I will advance the premiums as before." On the 9th March appellees answered, saying: "We do not want to insure any until about July. Then we expect to insure for about $15,000. I think you will run no risk in that time, as the property would be worth the amount due you if the building was to burn down." There is another letter from appellees of March 27, 1876, which responds to a demand for a plan of the buildings, to insure them as a protection for appellant's large debt. All of this correspondence recognizes, admits and promises, in effect, to pay the debt sued for, and takes the notes out of the operation of the statute of limitations, as the Court below held.

The *pleadings distinctly admit* that the giving of the notes for interest began on the maturity of the $7,500 note, and was kept up without intermission until the year 1874, when the small notes referred to in the bill were given. *Brigham v. Hutchins*, 1 Williams, (Vt.) 569. This fact may be coupled with the execution of the notes to save the bar. The acknowledgment must be contained or comprehended in same writing, signed by the parties to be charged, and if, comprehended in the small notes for interest there be "a clear, distinct and unconditional" acknowledgment of the original debt, it would seem that there can be no difficulty in the case. Payment of interest *qua* interest where the debt consists of principal and interest will take a case out of the operation of the statute at the common law. 2 Chitty's Contracts, 1254, 1255. The process of mental action involved in every written contract to pay interest, necessarily involves "a clear, distinct and unconditional" acknowledgment of the existence and validity of a debt to which the interest attaches as an incident. Now the general doctrine sanctioned by authority is, that the acknowledgment must be shown or appear to relate to the debt which is the cause of action, and will be presumed to refer to that

proved by the creditor unless another is shown to exist by his evidence or that of the debtor. The reason is, that if there be no other debt there is no need of proof, and if there be, the burden rests with him who maintains the affirmative.

The acknowledgment need not be made expressly or in words, but may be implied from any act or statement which necessarily and directly admits or presupposes the existence of the debt and the obligation to pay it. It is for this reason that the payment of interest is an admission that the principal is due and payable, whether the interest has accrued before or after the bar of the statute. *Marcaline v. The Creditors*, 21 La. An. 423; *Trychough v. Osgood*, 21 Maine 176; Smith's Leading Cases, vol. 1, pt. 2, pp. 955, 963. The rule which requires the admission to be explicit ought not to be carried so far as to enable the debtor to lull the vigilance of the creditor to sleep by language which the latter can only understand as an acknowledgment, and then escape under cover of an ambiguity that may have been designed and was necessarily injurious.

Gibson v. Grosvenor, 4 Gray, 606;
Brown v. Keach, 24 Conn., 73;
Whitney v. Bigelow, 4 Pick., 410.

That the statute is positive is not allowed to be used against conscience, and an equitable tribunal will supply and administer, within its own jurisdiction, a substitute for an original legal right of which a party has been fraudulently and unjustly deprived. Angell on Limitations, § 30. The acts and admissions of a party operate against him in the nature of an estoppel, when in good conscience and honest dealing he ought not to be permitted to gainsay them. They ought to conclude a party from asserting a right when they are plainly inconsistent with that right and have been acted upon by the other party. When a party tacitly encourages an act to be done, or consents to it, he cannot afterwards exercise his legal rights in opposition to such consent. Whatever the motive be, one who so acts or speaks that the natural consequences of his words or conduct will be to influence another to change his conduct, is legally chargeable with an intent or wilful design to induce the other to believe him and act upon that belief, if such be the actual result.

Wilkinson v. Flowers, 37 Miss., 579;
Sugg v. Thrasher, 30 Miss., 155;
Marshall v. Minter, 43 Miss., 666;
Work v. Harper, 33 Miss., 107;
Redjway v. Morrison, 28 Ind., 201;
Magee v. Ramsey, 46 Texas, 391;
Wade v. Cowles, 24 Ala., 446;
Tainter v. Winter, 53 Me., 348;
Morris Canal v. Lewis, 12 N. J. Eq., 323;
Preston v. Mann, 25 Conn., 118.

Aside from all these considerations the mortgage given by J. D. Mayer & Co. to the Union Bank of Louisiana, was a clear acknowledgment, within the statute, of appellant's debt. It is true the debt was scaled according to appellees' idea of the rights of the parties, because of the "excess" of interest paid, but that does not affect the real *status* of the case; and it is convincing in the establishment of the intention of the parties at the time the contract was entered into as to what law was to govern it.

Grayson v. Taylor, 14 Texas, 672;
Balch v. Onion, 4 Cushing, 559.
Merritt v Swift, 18 Conn., 257.

My conclusion, based upon the authorities cited and the reasoning employed, is, that the contract, as to the $7,500 note and the mortgage securing it, is a Mississippi contract and governed by the laws of Mississippi in the payment of interest. Thus considered, only the excess above ten per cent. per annum could, in any event, be recouped against the sum claimed by the appellants, for the years antedating 1873, and succeeding the year 1875. By the Act of March 12, 1873, any rate of interest agreed upon in writing by the contracting parties could be charged and collected, and this statute was not repealed and the former law restored until February 26, 1875.

Laws of Mississippi, 1873, 81;
Laws of Mississippi, 1875, 214.

It may be well to state here that the appellees, in their answer to the garnishment and to the bills distinctly, admitted under oath that the balance due on the $7,500, if the statute of limitations did not apply to it, after deducting all usurious interest, equalled the sum of $2,509.75, for which they gave their mortgage to the Union Bank of Louisiana. The last of the small notes given for interest and insurance premiums were dated May 12, 1874, and they were certainly, so far as the laws of Mississippi are concerned, not usurious; and if those for the year 1873 bore the same date the same remark applies to them.

It is difficult to fix the dates of these small notes other than as stated above. Mrs. Barnes, in answer to the fourth interrogatory, speaks of interviews in 1868, 1870 and 1873, in which Mayer asked each time for William Barnes to carry the debt without suing J. D. Mayer & Co. and they would pay the interest. The interviews in 1870 and 1873 had reference only to the note owned by appellant. She, also, says that as an inducement to Mr. Barnes to give extension of time they paid a higher rate of interest than the note called for. William Walsh says that the collection of the note for $7,500 was deferred from time to time by William Barnes, upon the agreement that, by payment of interest from time to time, the note should be extended. The custom between debtor and creditor had been to furnish notes for the interest, which, when paid, were a

settlement of the interest for the year. He was present at an interview between J. D. Mayer and Barnes, in the winter of 1870, in reference to the agreement. Mayer had been endeavoring to borrow the money to pay Barnes and had failed. Mayer promised to give the firm's note for interest and premiums, on which Barnes could realize, and thus secure payment of the interest in cash. Barnes said if these notes for interest and premiums were regularly paid he would continue to carry the note. The note was renewable year after year, and Barnes was not to foreclose as long as the interest and insurance premiums were paid. The acceptance of the interest involved the obligation on Barnes, up to September, 1874, not to foreclose on the note or mortgage, and he bought the note on this condition. Ans. to 11 int. in chief.

No steps were taken to foreclose the mortgage because the interest on the note was paid up to September 1, 1884, and, at the instance and request of J. D. Mayer & Co., the note was extended and Barnes abstained from foreclosing the mortgage. The consideration for the extension was the payment of interest from time to time. The agreement was that the debt should not be sued for or foreclosed as long as the notes, given each year for interest and premiums, were paid. The understanding was entered into in the winter of 1870, and when he purchased the note in June, 1874, and received it with the small notes accompanying the same, he was informed by Barnes that the small notes were for the interest and premiums and were given in accordance with the agreement of 1870, and before, and that the mortgage could not be foreclosed before September, 1874, under his agreement with appellees. Ans. to 12th int. in chief; ans. to 9th cross int.

Mrs. Davis says that the interest notes were collected by her husband two years in succession for one Stoddard Harrell who had purchased them. Ans. to 3d int. in chief.

The only note for interest that can be found is filed as an exhibit to the answer of J. D. Mayer & Co., and it is said that others conformed to it in date and amount. They were executed in New Orleans and payable generally, *though the makers then lived in Mississippi.* It is clear that the contract for extension was made in Louisiana, and the notes were drawn in that State. They were placed in such shape as to be readily negotiable in the market, and were intended to be sold to raise the interest and insurance premiums. I do not suppose that they could have been sold for more, and Barnes is shown not to have had capital enough always to justify his retention of them. The plea of usury could not have been interposed against them in the courts of Mississippi or Louisiana when held by a purchaser.

Woods v. Lawrence Co., 1 Black 386;
Sherman v. Blackman, 24 Ills. 345;
Newman v. Williams, 29 Miss. 212;

Iudy v. Gerard, 4 McLean 360;
Churchill v. Suter, 4 Mass. 156.

But if the notes *endorsed in blank* were given to be sold to raise money in behalf of appellees, and were in fact sold, the contract was purged of all usury so far as the purchasers were concerned; and, indeed, the mortgagee, Barnes, could only, in a court of equity, be charged with what he had in fact received on account of the proceeds of sale thereof. It was perfectly fair, as the case went, to do this; but certainly unjust to make the appellant carve out of his debt what his assignor had not in fact *received, or taken*, in the language of the usury law. Indeed if the laws of Louisiana apply to the new notes they were not usurious. A contract to pay a higher rate of interest than eight per cent per annum is not usurious *unless the interest agreed upon be included in a written obligation and form part of* the amount for which the written obligation is given. If the usurious interest enter into a note the vice of the transaction is cured.

Walker v. Villavosa, 18 La. An., 714; 21 La. An., 279;
Civil Code 1875, p. 365; Id. 1867, p. 393.

The usury laws of Mississippi in existence at the time the contract in this case was made, apply to bonds, notes, accounts, judgments and contracts. Code of 1857, p. 370. Former statutes applied to notes, contracts or bonds for the payment of money founded on any bargain, sale or loan of wares and merchandise, goods and chattels, lands and tenements, or any use or occupation thereof, and avoided all the interest where more than eight per cent. was charged, though a loan of money could be effected at ten per cent. per annum. Hutchinson's Mississippi Code, 641. In *Toney v. Grant*, 10 S. & M., 89, a plantation and negroes were sold for a price to be paid in installments, and ten per cent. interest was added to each installment from the date of the contract until maturity, and the contract was held to be *usurious because not for a loan of money*. This, I understand to be in accordance with the usury laws generally adopted. Tyler on Usury, pp. 103, 104, 108; 114, 116, 117, 127; *Scott v. Moore*, 9 Peters, 418; *Nichols v. Fearson*, 9 Peters, 109.

It accords with the letter of the usury laws of Louisiana, by which it is lawful to stipulate interest *for a simple loan of money or other movable things*. This interest is legal or conventional, and by the statutes antedating 1844, conventional interest could not exceed ten per cent. I know that the usury law has been held applicable to a sale of *immovable property* in the State of Louisiana under peculiar circumstances, but scarcely conceive that it could reach its arms beyond the limits of that State so as to include the sale of lands in another State, even if the contract could be said to be a Louisiana contract. It could not so far contravene the almost universal doctrine to the contrary.

The defense of usury was not applicable to the case at bar

considered from another standpoint. The note bore interest up to maturity at six per cent. per annum, and after maturity at ten per cent. per annum. The makers of the note could discharge themselves, on the maturity of the note, by paying the principal and *six per cent. interest;* and when, by the terms of the contract this can be done, there can be no plea of usury maintained.

Rogers v. Sample, 33 Miss., 310;
Lloyd v. Scott, 4 Peters, 205;
Gould v. Hill Colony, 33 Ills., 324;
Cutler v. How, 8 Mass., 257;
Wright v. Shuck, 1 Morris (Iowa), 425;
Ganebrel v. Doe, 8 Blackf., 140;
10 Bacon's Abrigment, Title Usury, C. 282, 3, 4.

If I am mistaken in the views I present, and the court below was right in the conclusion that the contracts, one and all, were to be governed and controlled by the laws of Louisiana, I yet think the decrees, interlocutary and final, were erroneous. The provision of the Louisiana statute of 1844 reads thus: "If any person hereafter shall pay *on any contract* entered into after the passage of this act, a higher rate of interest than the above, as discount or otherwise, the same may be sued for and recovered within twelve months from the time of such payment." By the same act conventional interest for a simple loan exceeding eight per cent. was disallowed "under pain of forfeiture of the entire interest so contracted." There was no stipulation on the subject otherwise. The contract was not touched; the interest charged was forfeited and the creditor could collect none; but if the debtor paid he was allowed to recover the interest back if he sued within twelve months.

Thompson v. Woodbridge, 8 Mass., 255.

The direct question raised has been decided by this Court and the Supreme Court of Louisiana. *Cook v. Lillo*, 103 U. S., 792, was, as I understand it, a case in equity, and this Court thoroughly dispose of the claim for imputation of interest paid to principal. "Before this statute," says the Court, "which was first enacted in 1843, it had been decided by the higher Court of the State in several cases that money paid for usurious interest could not be reclaimed or imputed to the capital. Since the statute it has been held that a reclamation cannot be made or the usurious interest imputed to the principal, unless the suit for the recovery is begun, or the plea for usury set up to the claim within twelve months after the payment is made. In view of these decisions, the appellant was not entitled to any credit on the principal of his debt by reason of usurious interest paid, because his last payment of interest was made in March, 1875, and this suit was not begun until January 11, 1877, more than twelve months afterward."

The arguments of counsel are not reported and I cannot discover what views of the Louisiana statute were presented

and urged upon the consideration of the court; but I can see no reason why the opinion of the court is not conclusive of the defences here urged by the principal defendants in the court below. The assignees of the equity of redemption had no right to rely upon the plea of usury.

DeWolf v. Johnson, 15 Wheat. 367.

It will be observed in this case, that appellant is not the original owner of the mortgage note or the small notes given for interest thereon. In June, 1874, he purchased the note for $7,500 from William Barnes in New Orleans, in view of the contract for extension, and upon the idea that the day of payment had been postponed; paid him in cash $5,773.50, and surrendered to him a note of his held by appellant of $1,000 and interest, making the total price paid $6,800. Ans. Wm. Walsh to Int. 3: Mrs. Barnes Ans. to 2d Int. He, also, purchased the small notes given for interest. In this aspect of the case, could a court of equity, treating the notes as Louisiana contracts, properly pay back to appellant the money expended in the actual purchase, by applying towards its discharge usurious interest paid to Barnes? I think not. In *Hart v. Goldsmith*, 1 Allen, 148, the Supreme Court of Massachusetts say: "Our statute does not make the contract void; and the provisions giving the right to the deduction of the penalty, or to recover it back when the usurious interest has been paid, are regarded, to a considerable extent, as remedial rather than penal. We think it is manifestly most consistent with the letter and spirit of the law to treat the mortgage as a mere incident to the debt in determining what is due to the mortgage, to govern the inquiry by the same rules as if they were a suit brought upon the note, or other contract which the mortgage was made to secure; and to regard in equity the defendant, who asserts his rights under the contract by his answer, as occupying the same position as if he had brought an action to enforce it at law." That seems to us to be the correct solution of the question involved.

Now, by the laws of Mississippi, if they are to control, the statute of limitations applies to the case of any debt or demand or contract alleged by way of set-off on the part of the defendant. Code of 1857, p. 402, Art 22; Code of 187, § 2166; Code of 1880, § 2687. This of itself would cut off the entire counter-claim of the appellees, if any such one existed. It will be noted, by a reference to the Louisiana laws on this subject, that conventional interest for *a simple loan* exceeding eight per cent. was *forfeited*; payment on any contract entered into of a higher rate than eight per cent. only entitled the party paying to a suit for its recovery within one year after such payment. If this law be looked to to work out the equities of the appellees, it does appear to me that they have lost all right whatever to recover the interest actually paid, that being a qualified right only. Nor can it well be argued that the laws of our State

should be invoked in part to determine a question more favorable for the appellees as to the extent of their counter-claim, and the laws of a different State applied to give it full effect. Laws cannot be so parcelled. Our statute should apply throughout the adjustment, or not at all. It is undoubtedly true that generally the law of the forum applies when the statute of limitation is pleaded as a defense, because it is said to effect the remedy only; but here the law of another State is allowed to give an absolute right in contravention of the law of the forum, when the *lex loci contractus* concedes the right *sub modo* only. This seems to me to be inequitable.

It is held in Mississippi, and by the court, that the statute of limitations of our State is not, as a general rule, technically pleadable in another, yet, when such statute not only bars the remedy, but vests the property in the possessor, such title, so acquired, will be protected in every other state. *Feas v. Sykes*, 35 Miss., 633; *Shelby v. Guy*, 11 Wheat., 361; *Moseby v. Williams*, 5 How., 523. And we think the same rule ought to be applied in this case.

But it may be urged that the new revival of the mortgage note does not revive the mortgage, and the attempt may thus be made to defeat the appellant. The law in Mississippi is the other way. No action or proceeding could be had to foreclose the mortgage but within the time that is allowed for the commencement of an action upon the writing in which the sum of money secured by the mortgage may be specified. "And in all cases where the remedy at law to recover the debt shall be barred the remedy in equity on the mortgage shall be barren." Code 1857, p. 399; Code 1871, § 2150. This statute has been construed to mean that the remedy in equity continued so long as the party interested had a right to sue at law.

Maddox v. Jones, 51 Miss. 531.

Mahon v. Cooley, 36 Iowa, 479.

The mortgage remained uncancelled and undischarged of record, and constituted a lien for the unsatisfied debt, and imparted constructive notice thereof to the world.

Washington County v. Slaughter, 10 Reporter, 493.

On the whole case we, therefore, conclude as follows:

1. That the original contract made by the note for $7,500 and the trust deed to secure the money represented by it, constituted and were a contract entered into by the parties at the time with reference to the laws of Mississippi.

2. That by the agreement of the parties, at the time, the note was to be extended from year to year on the payment of interest at ten per cent. after maturity, according to the laws of Mississippi, and that so long as the interest was paid no suit to collect the note or foreclose the mortgage could be begun.

3. That on appellees' failure to pay interest there was an agreement that the same should be provided for by the execution of new notes at fifteen per cent., drawn to order and en-

dorsed in Louisiana, which, by contract, were to be placed on the market as need required and sold, and the proceeds applied to the discharge of interest on the large note; and that these notes were Louisiana contracts.

4. That the appellant was en itled to a decree for his entire debt, the small notes given to cover interest having freed them, by the Laws of Louisiana, from the vice of usury; or if not so, that his debt could only be lessened by the excess of interest over ten per cent per annum actually paid to or received by the appellant's assignor, and that no counterclaim could or should be allowed for the small notes in 1873 and 1874 actually purchased by appellant from Barnes, the Mississippi usury law being then repealed.

5. That if the note for $7,500 be considered as a Louisiana contract purely, the stipulation of ten per cent. *after its maturity* did not render it usurious, being part of the consideration of the purchase and for damages for non-performance of the contract at its maturity. Or, if the note were, in this respect, usurious, that the appellees were barred of all right to recoup the same against the debt sued for, because they had paid the interest, and more than a year thereafter had elapsed before the bringing of the suit, and because, by the giving of the negotiable notes to be sold to pay the same, a new contract for interest, legal by the laws of Louisiana, had been made and the vice of usury had been cured

6. That on the facts alleged and proven, the statute of limitations did not begin to run against the debt, if then, until September 1874; or if it did, that the new acknowledgements and promises saved the bar.

7. That the appellees failed to plead usury in such manner as to entitle them to claim its allowance at the hearing as an offset against appellant's claim.

8. That the mortgage executed in favor of the Union Bank of Louisiana, in any event, fixed the limit of recovery below which the court should not have reduced the debt.

9. That appellant was entitled to a foreclosure for the full amount paid for the note and interest under the peculiar facts of the case, even if the usury could have been pleaded against Barnes. By the agreement between the parties the note was really not due when it was so purchased.

W. L. NUGENT,
Solicitor Appellant.

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SUPREME COURT U. S.
FILED
JAN 23 1904
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

WILLIAM WALSH
vs.
J. D. MEYER, *et al.* } No. 239.

J. D. MEYER, *et al.*
vs.
WILLIAM WALSH. } No. 507.

P. PHILLIPS,
W. HALLETT PHILLIPS,
of Counsel for William Walsh.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES.

WILLIAM WALSH	
vs.	No. 239.
J. D. MEYER, *et al.*	

J. D. MEYER, *et al.*	
vs.	No. 507.
WILLIAM WALSH.	

Brief of P. Phillips & W. Hallett Phillips for William Walsh.

In 1866, J. D. Meyer & Co. made their promissory note, dated at New Orleans, for the sum of $7,500 with interest at 6 per cent. until maturity, and 10 per cent. from maturity until final payment, payable two years after date, and payable to William Barnes.

The note was given in part payment of the purchase money of a certain property known as Barnes Hotel, situated in Mississippi City in the State of the same name.

To secure the note Meyer & Co. gave a mortgage on the Hotel.

The present suit is a bill filed in the Circuit Court for the Southern District of Mississippi to foreclose the mortgage, and is brought by Walsh the purchaser of the note.

Two defenses were raised by Meyer & Co. in their answer.

1. The Mississippi statute of limitations.

2. That the interest agreed upon was usurious "and that the whole excess shall be credited as payments on the note." p. 28.

The court ruled that the suit was not barred. It was held, however, that the note was governed by the law of Louisiana; that the interest was usurious under that law, and that the whole amount of interest which had been paid to Barnes should be deducted *from the face of the note*. R., p. 124, 134.

Accordingly there was a decree in favor of complainant for $702 only. From this decree, on the 12th of February, 1881, Walsh took the present appeal, No. 239. R., p. 128.

On the 9th of February, 1882, Meyer & Co. were allowed an appeal, which is No. 507. The Union National Bank, and Schmidt & Zeigler, creditors of Meyer & Co., and subsequent mortgagees, also unite in their appeal.

Assignment of Error.

1. The court erred in not entering a decree for the whole amount of the note with interest.

2. The court erred in holding that the note was governed as to interest by the law of Louisiana.

Whether viewed as a Louisiana or Mississippi contract, the court should not have allowed the interest *already* paid to Barnes, the original payee, to be deducted from the face of the note.

The Louisiana law is as follows:

> "ART. 2. Article two thousand eight hundred and ninety-five of the Civil Code shall be so amended that the amount of conventional interest shall in no case exceed eight per cent, under pain of forfeiture of the entire interest so contracted.

"SEC. 3. If any person hereafter shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and recovered within twelve months from the time of such payment."

Rev. St., 269.

Under this statute the only remedies given in case of usury are, (1) the forfeiture of interest when it is attempted to be collected; (2) the right to sue for and recover the usurious interest paid within twelve months.

When the suit below was brought by Walsh, the alleged usurious interest had been paid. No suit had been brought to recover it back, and more than twelve months had elapsed from the last payment of interest. The court had no right to enforce a penalty which the law did not provide, by deducting from the face of the debt the interest which had been paid, and that six years after the payment.

The question has been decided by this court under rhe the National Bank Act, which contains provisions similar to the Louisiana statute By sec. 5197, R. S., the rate of interestis fixed which National Banks can take:

SEC. 5198 provides "the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid may recover back in an action in the nature of an action of debt twice the amount of the interest thus paid; provided such action is commenced within two years of the time the usurious transaction occurred."

In *Driesbach* vs. *National Bank* it was sought to have usurious interest *paid* a National Bank applied in satisfaction of the principal of the debt. The court held this could not be done, saying:

> "The claim is not for interest stipulated for and included in the notes sued on, but for the application of what has actually been *paid* as interest to the discharge of principal."
>
> 104 U. S., 53.

To the same effect is *Barnet* v. *National Bank*, 98 U. S., 555.

The Mississippi Code provides as follows:

> "§ 2279. The legal rate of interest on all bonds, notes, accounts, judgments, and contracts shall be six per cent. per annum; but contracts may be made in writing for the payment of a rate of interest as great as ten per cent. per annum. And if a greater rate of interest than ten per cent. shall be stipulated for in any case, such excess shall be forfeited on the plea of the party to be charged therewith."

The decisions of this Court under the National Bank act, are applicable to the Louisana Statute.

Usurious interest, which has been paid, cannot be recovered back after the lapse of twelve months, nor can it be imputed to the original debt.

> *Cook* vs. *Lillo*, 103 U. S., 792;
> *Cox* vs. *McIntyre*, 6 Ann., 470.

2. When the parties made the contract they had in view the law of Mississippi.

As no place of payment is specified, the law governing the note must be ascertained from the intention of the parties.

That they did not contemplate the Louisana law is shown from the fact that the rate of interest, as specified, is directly contrary to the statute law of that State, and is in accordance with the statute law of Mississippi.

The contract was for the sale of property in Mississippi, and the note in question was given for a deferred payment and was made a lien on the property by the mortgage

The contract of sale was made in Mississippi, where the mortgage was given.

The makers of the note were at the time citizens of Arkansas, and bought the property for the purpose of dwelling on the same and keeping a hotel. See testimony of Mrs. Polydore, one of the defendants. p. 121.

It cannot be denied that parties may contract in reference to the law of a State, even if there the rate of interest is greater than the rate allowed in the State where the contract is made or is to be executed.

The presumption is that where the contract in express terms provides for a rate of interest lawful in one but unlawful in the other State, the contract is made in reference to the laws of the State where the stipulated rate is lawful.

When, as in this case, a mortgage is given upon lands situated in a different State from that in which the note is dated and the creditor resides, that fact is of significance in determining the intention of the parties.

Scott vs. *Perlee*, *Sup. Ct of Ohio*, 22 Am. Law Reg., N. S., 472.

Phillimore says:

> "As all the foregoing rules rest upon the presumption, that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements."
>
> 4 Inst. Law, Sec. DCL IV., p. 470.

This is quoted, with approbation, in *Pritchard* vs. *Norton*, the court remarking:

> "If this rule is universally applicable, which, perhaps, it is not, though founded on the maxim *ut res magis valeat, quam pereat*, it would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.
>
> "At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail unless controlled by more express and positive proofs of a contrary intent."
>
> 160 U. S., 137.

If the court had applied the law of Mississippi, the rate of interest stipulated in the note, was legal.

If illegal interest was paid to Barnes as a consideration for the renewal of the note, the forfeiture of the amount paid in excess of the legal rate, is the most that could be contended for.

It is submitted that the court should have made a decree in favor of complainant for the whole amount of the note with the stipulated interest.

No. 507.

The cross-appeal of Meyer was taken a year after complainant had taken his appeal, which was docketed *April 26, 1881*.

The cross-appeal was docketed *March 21, 1882*.

It is left with the court to determine whether, under these circumstances, they will take cognizance of the cross-appeal.

At the last term there was a motion to dismiss the cross-appeal on the ground that the *amount in controversy* was not

sufficient to give the court jurisdiction. This motion was postponed until the hearing on the merits.

The decree against the defendants, Meyer & Co., was $702. (p. 127.)

The decree fixes the amount in controversy as to the defendants, and, consequently, the matter in dispute is, whether the court should have permitted the recovery of the $702.

It is not sufficient to give the court jurisdiction to show that if *our* appeal should be sustained, *then* the amount in controversy would be sufficient.

The amount involved in the *particular appeal* must be sufficient. Its collateral effect cannot be considered.

Elgin vs. *Marshall*, 106 U. S., 581.

Cross-appeals are governed by the same rules as appeals.

The S. S. Osborne, 105 U. S., 450.

If the cross-appeal can be considered, it raises the question whether there should have been any recovery at all by reason of the statute of limitations.

Section 2151 Revised Code of Mississippi, 1871, provides that actions on promissory notes should be brought within six years after cause of action accrued.

Section 2165. In actions of debt, assumpsit, or on the case founded upon any contract, no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party chargeable thereby."

Interest was paid on the note until September, 1874. (Answer, p. 27.)

On June 30, 1874, Walsh wrote to the defendants, Meyer & Co., advising them that he had become the owner of the principal note and also of the interest note for the current year.

To this there was a reply, "your letter received in reference to your now *being the holder of my notes*." p. 6.

On November 30, 1874, Walsh wrote Meyer & Co., informing them that he wished to see them in relation to the note of $7,500, of which he was the owner; that the interest had been paid up to September last, and that he needed money and wished to know what they proposed to do.

To this Meyer & Co. replied, December 8, expressing their willingness to pay three months' interest, but that they had been served with a garnishment, and that they did not want to run the risk of paying twice.

On March 26, 1876, Walsh again wrote to Meyer & Co. in regard to the insurance of the mortgaged property, "the amount you owe me on the $7,500 is too large to be left in an unprotected condition, and I cannot consent to it."

On the 9th March, 1876, defendants reply: "Yours at hand; we do not want to insure any until about July, when we expect to insure for about $15,000. *We think you will run no risk in that time, as the property would be worth the amount due you if the building* was to burn down." (R., 77–80.)

The court below held, and, we submit, correctly, that this correspondence taken together constituted an admission sufficient to take the case out of the statute.

The court was further of the opinion that the notes given by Meyer & Co., for the payment of interest, formed such a consideration as would have stayed Barnes from an enforcement of the collection of the principal note until after the interest notes became due and payable, and that thereby prescription was arrested.

These notes commenced being issued before the bar attached, and were kept up without a breach until September 4, 1874.

This was less than six years before the commencement of suit.

The understanding was that Barnes should not call upon Meyer for payment of the principal note as long as the interest was paid.

We refer the court to the extended consideration of the question of limitations in the printed argument of our associate, Mr. Nugent.

P. PHILLIPS,
W. HALLETT PHILLIPS,
of Counsel for William Walsh.

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SUPREME COURT U.S.
FILED
JAN 14 1884

IN THE

SUPREME COURT OF THE UNITED STATES.

JOHN D. MAYER ET AL.
vs.
WILLIAM WALSH.

No. 504, Oct. T., 1883.
Cross Appeal.

Brief of Counsel for the Cross-Appellants.

The history of this case as disclosed by the record is as follows:

1. *January* 2, 1866.—J. D. Mayer, C. F. Mayer, and Henrietta Polydore (brothers and sister) bought in New Orleans, from William Barnes, certain real property at Mississippi City for the price of $25,000, $10,000 cash and balance at 1 and 2 years, with interest at six per cent. per annum from date until maturity, and ten per cent. from maturity till final payment.

2. *February* 20, 1866.—The credit portion of the price was in the shape of two promissory notes for $7,500, dated at New Orleans, January 2, 1866, and their payment was secured by a deed of trust upon the property. The note at one year has been paid; the other is the subject of this suit. It is drawn by the brothers and sister to the order of themselves. It is signed and endorsed by all three separately, and reads, "We promise," &c. It has also written upon it the dates of five payments of interest, but no amount specified in any instance, *and all* in *Barnes' name*. The last endorsement is dated September 1, 1874. Rec., pp. 12, 13.

3. *June* 22, 1874.—The Union Bank obtains judgment against Barnes for $4,236.81. Rec., p. 53. The next day Barnes transfers insurance policy to Wm. Walsh, as collateral security, rec., p. 94, and the Union Bank's judgment (Louisiana) is signed on June 26, 1874. Rec., p. 53.

4. *June* 30, 1874, William Walsh notifies J. D. Mayer & Co. that he has become the owner of the note; also of two notes for $693.75 each, given by them for fire premiums on the above property and for interest on the above note, and that fire policies for $10,500 have been transferred to him. Rec., p. 77.

5. *July* 6, 1874.—J. D. Mayer acknowledges the receipt "in reference to your now being *the holder* of my notes." Rec., p. 78.

6. *August* 1–4, 1874.—Note $693.75 paid to Wm. Barnes and not to Wm. Walsh.

7. *Sept.* 1–4, 1874.—Note $693.75 paid to Wm. Barnes and not to Wm. Walsh. Record, p. 55.

8. *Nov.* 23, 1874.—Union Bank begins attachment suit against Wm. Barnes in Mississippi, and makes J. D. and C. F. Mayer and Polydore garnishees as well as the present orator garnishee, and they are all served *personally*. Record, p. 30.

9. *Nov.* 30, 1874.—(Prior to Walsh's being cited as garnishee) he writes to J. D. Mayer & Co., stating the interest on the $7,500 note *as paid to 1st September last*, "but I need money, and I wish to know what you propose to do," &c. Rec., p. 78.

10. *Dec.* 8, 1874.—J. D. Mayer & Co. reply, alluding to the insurance premiums, but notifying Walsh that "we were served with the enclosed writ some few days ago, with instructions if we paid anything now it was at our own risk until the case was decided." Rec., p. 78.

11. *Dec.* 13, 1874.—Walsh was personally garnisheed in Union Bank suit. Rec., p. 33.

12. *January* 28, 1875.—Walsh writes to J. D. M. & Co. about insurance, to which J. D. M. *individually* replies on February 9, 1875. Rec., pp. 79, 80; also pp. 7, 8.

13. *May* 4, 1875.—William Barnes dies. Rec , p. 51.

14. *July* 10, 1875.—Walsh sends J. D. M. & Co. memorandum of insurance premiums, Ex. E., p. 17, $303.83.

15. *October* 10, 1875.—A like account, Ex. D., p. 17, $311.14.

16. *October* 18, 1875.—Walsh writes to Henrietta Polydore, to which she replies *November* 1, 1875. Rec., 8, 9, 80.

17. *February* 25, 1876.—J. D. and C. F. Mayer and Mrs. Polydore mortgage to Schmidt and Zeigler Barnes hotel, &c. Record, p. 59.

18. *March* 2, 1876.—Wm. Walsh writes to J. D. M. & Co., and there is a reply March 9, 1876. Rec., pp. 9, 79.

19. *October* 23, 1876.—Judgment in the Union Bank's attachment suit against William Barnes. Rec. p. 41, and *eo die* against William Walsh. Rec., p. 42.

20. *October* 24, 1876.—J. D. and C. F. Mayer and H. Polydore file their answer as garnishees. Rec., pp. 42, 20. *Eo die* judgment, *that they go hence without day.* Rec., p. 43.

21. *October* 26, 1876.—George Wood as *amicus curiæ*, suggesting death of Wm. Barnes prior to judgment against him, the court sets aside the judgment against the said Wm. Barnes. Then a *sci. fa.* issued to revive suit against Henderson, Barnes's administrator, and further proceedings on Rec., pp. 43, 44, 45, 46, 47.

22. *October* 23, 1877.—Final judgment, Union Bank vs. Wm. Barnes's administrator, and vs. Wm. Walsh as garnishee. Rec., pp. 49, 50.

23. *October* 25, 1877.—Walsh's affidavit, motion to set aside the judgment against him, which is granted, and he files his answer as garnishee, denying property. The Union Bank joins issue on the allegation that he has not made a full and true discovery, and sixty days' delay granted for filing particulars. Rec., pp. 48, 49, 50.

24. *June* 24, 1878.—Deed of trust to Union Bank. Rec., p. 18.

25. *May*, 1879.—The Union Bank vs. Henderson, adm'r, and Wm. Walsh, garnishee, and *by consent* this cause is dismissed, the costs in this case having been paid. Rec., p. 51, at top.

26. *Dec'r* 29, 1879.—Wm. Walsh files this bill in equity. The questions involved under the pleadings are—

First. Is Walsh the owner of the note sued on?

Second. If he be the owner, is he not estopped by his own acts from claiming any interest in the notes adverse to either J. D. or C. F. Mayer or H. Polydore?

Third. Or adverse to Schmidt & Ziegler and the Union Bank?

Fourth. Is not the note prescribed?

Fifth. If Walsh is neither estopped nor the note barred by statute of limitations, what law governs the contract evidenced by the note? Is the note a Louisiana contract? Or a Mississippi contract?

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ASSIGNMENT OF ERRORS.

Cross-appellants therefore assign as errors, going to the whole of Walsh's cause of action—

First. That he is not the owner of the note sued on; but if your Honors should conclude him to be the owner, then he is estopped by his acts from claiming anything as due to him upon said note as against the cross-appellants, or any one of them.

Second. That the note is barred by the statute of limitations.

ARGUMENT.

On the first assignment of error, the lower judge was of opinion —"3d. That having purchased the note exhibited with his bill with knowledge of the facts, the complainant stands in no better position than would Barnes were he living, in this cause, and is to be affected with all the equities between Barnes and J. D. Mayer & Co." Rec., p. 124.

The allegation of the bill is—"to William Barnes, who, on or about the 30th day of June, 1874, sold and delivered the said note to your orator for a valuable consideration, of which the defendants were duly notified." Rec., p. 1. But on rec., p. 4, the date is stated to be June 3, 1874, in two places, and in his testimony, he also affixes no date beyond "in the month of June, 1874," he says he bought the original note from Wm. Barnes * * "and paid him therefor in cash, $5,773.50, and surrendered to him his note that I held of a thousand dollars and interest, making the total price of $6,800 paid by me for the note."

See his answer to second interrogatory, rec., 70.

When interrogated "whether, at the time you acquired the note, copy whereof is attached to int. 2, you purchased any other notes from William Barnes now deceased; if so, give dates and amount, and when they became due, what you did with them, and when and how, and if at all, the same was paid, and by whom, and how they were signed." Rec., p. 74.

His answer is, (p. 71), "I did; their amounts and maturities are specified in the above Exhibit 1, and also in Exhibit 12 hereto attached, in each of which letters I advised defendants of my owership of these notes, and desire to have them paid I had them collected; they were paid at or about their respective maturities by defendants; they were both signed and executed by J. D. Mayer & Co." Rec., p. 71.

These two notes for $693.75 each were therefore *thrown in*; for them, Walsh paid nothing, by his own statement. These notes were payable to Wm. Barnes's order but not endorsed until paid to Barnes.

The relations between Walsh and Barnes were of the most intimate character; they lived together; they had been bosom friends for many years and from boyhood, (rec., p. 88, at foot—testimony of Barnes's daughter;) Walsh knew everything about the transactions between Barnes and the defendants; he had made out one of the calculations or statements of interest (rec., pp. 118 and 122, at foot;) on the very day after the judgment in Union Bank vs. Barnes, he takes assignment of one of the insurance policies before the judgment is signed, and he buys in the face of that judgment. The record is silent as to any contemporaneous delivery of the notes, or when and how he obtained manual delivery of them, at last; whether before or after Barnes's death, except his own unsupported evidence. Walsh says he paid in cash, $5,773.50 for the note, and surrendered Barnes's note for $1,000 and interest. This, so far as the note for $1,000 is concerned, was *adation en-paiement* and was void if without delivery. That all the notes were in *Barnes*'s possession after the sale, results from the evidence. As nothing shows when they passed into or out of Walsh's hands, and as the admission by necessary implication of Walsh is that Barnes held them up to Walsh's return to New Orleans in October, 1874, *as his agent*, (answer to seventh direct interrogatory, p. 71,) the whole transaction has all the features of a trust, and exactly such a trust as is prohibited by article 1519, *et seq*, of the Louisiana code.

The ownership of the notes by Walsh is specially denied in the defendant's pleadings no less than three times. *First*, in the answer of the vendees of the hotel, (rec., p. 27); *Second*, in that of the Union Bank, (rec., p. 56); *Third*, in that of Schmidt & Zeigler, (rec., p. 58, at foot).

Thus the full and complete proof of the fact of Walsh's ownership of the notes devolved on the plaintiff. His own testimony alone, even if it were otherwise full and complete, would not suffice. Walsh's ownership of the notes is not proved.

II.

But if this view of the cross-appellants should be held incorrect, and if Walsh must be considered as the *bona-fide* holder and owner of the note sued upon, from and after an uncertain date in June, 1874,—then it is urged that, by allowing the possession and apparent ownership of the notes to remain in Barnes after the sale; permitting Barnes to hold himself out as such owner to the world; sanctioning Barnes's collection of the two notes for $693.75 each, and *retaining the money as his own*, (for not a word in the record shows, or is it even alleged in the bill, that Barnes paid a dollar of the collection over to Walsh). Walsh is now clearly estopped on equitable principles from claiming anything as due on the note, for $7,500, from J. D. and C. F. Mayer, and

H. Polydore—and *a fortiori* from prejudicing in any way, or to any extent, the actual existing rights of Schmidt & Zeigler, or of the Union Bank.

Walsh claims to have become owner in June, 1874. He admits that during his absence from New Orleans, in the summer and fall of 1874, the three notes were in Barnes's hands up to October, 1874; that the two notes for $693.75 were collected by Barnes from J. D. Mayer & Co. at their respective maturities, ¼ August, and ¼ September, 1874. See his answer to seventh interrogatory, rec., p. 71. During this whole period of time, therefore, by the confidence and trust reposed by Walsh in Barnes, the latter held himself out as the real owner, and proclaimed the pretended ownership of Walsh a mere cover and a sham. Many facts in this record tend to show the truth of Barnes's proclamation. He was utterly bankrupt. The Union Bank had already obtained judgment in Louisiana, and, as soon as execution was returned *nulla bona* on that judgment, Barnes suspected that proceedings on it would be instituted in Mississippi. It was to protect the notes from attachment that they were made into the simulated ownership of Walsh, his intimate friend cognizant of all the facts. As these notes were about all the property Barnes had left, he was anxious to retain them as long as possible, that on the income derived from them he might support his family. *Seal* says, (rec. p. 111): "All I know about the ownership of the note is that I have often heard Barnes speak of it, and met him when he came here to collect the interest, and having heard him speak of it a short time before that suit was brought, (the attachment suit in Mississippi), as relying upon the interest of that note as a support for his family, and never having heard it questioned until the attachment suit was brought, or about that time; and the Mayers informed me that they owed it to Barnes when I brought the suit, and I often heard Mr. Davis, his son-in-law, speak of it; I was very intimate with Mr. Davis, and lived in his house for many years." Answer to 6th interrogatory, rec., p. 111. *Seal* was the trustee in the mortgage deed, and never received any notice whatever of a change of ownership in the note or the mortgage.

Mrs. Polydore says: "I had many conversations with William Barnes; he told me that he owned the notes, the interest notes and the principal note; he told me so the last time I saw him; when he came to collect the interest he inquired why I asked him; I told him that I had heard that he had or would be obliged to part with them; he said he had borrowed some money on the strength of them, but he had not parted with the notes, and he wanted the interest to pay back the borrowed money." Record, p. 120, at foot.

The two notes for $693.25, although made payable to William Barnes or order, were not endorsed until they had matured and were paid to him.

For reasons given, only one note for $693.25 has been produced. It is on record, p. 55. Interrogated in regard to it, J. D. Mayer says: "The note was paid at maturity, and to Barnes in person; he did have possession of it. It was not endorsed until after I had paid it. I asked him how it was that he held that note when Walsh had said that he owned it. He stated that I knew how it was, giving me to understand that it was his, not being endorsed to any other party. I told him he had better endorse it, which he did. He did not at that time speak of the note for $7,500." Rec., p. 114, at foot.

But Exhibit A, the note of $7,500, also shows that Walsh himself knew the very moment Barnes handed him the note in October, 1874, and without any objection on his part, that Barnes, in endorsing the two notes for $693.25 each, and endorsing the $7,500 note—"New Orleans, 1st Sep., 1874; interest on the within note paid in full to date; William Barnes"—had, with his consent, express or implied, been acting as the true owner of the three notes, whilst collecting the very interest notes in question. The endorsement alluded to speaks for itself. It puts to flight the ingenious theory of *agency* for the first time suggested by Walsh in his testimony, already quoted. If Walsh reflects for a moment he would admit at once that this endorsement is not "*the proper credit*" he wanted made on the note. Most certainly it is not one he would have himself made if he had been its *owner*.

In addition, we have the sayings and doings of Widow Barnes and Mrs. Davis, her daughter. For some particular reason, after the death of Wm. Barnes, they both desired, with Mr. Davis, that J. D. and C. F. Mayer and Mrs. Polydore should swear that they owed the note for $7,500 to Walsh. As Mrs. Barnes knew nothing about the sale but what her husband told her, (answer to third cross-interrogatory—rec., p. 76,) and does not even communicate that in a definite way, the presumption arises fairly from their acts that they had some interest in Walsh's alleged ownership; or, in other words, they were hostile to having the note declared as still the property of Wm. Barnes's estate.

Shortly after the maturity and payment of the last note for $693.75 to Barnes, and his endorsement of interest paid on the $7,500 note, the Union Bank proceeded by attachment in Mississippi against Barnes to realize their judgment previously rendered in Louisiana. Walsh was personally cited as garnishee Dec. 13, 1874, and J. D. and C. F. Mayer and Mrs. Polydore on Nov. 24, 1874. Walsh employed at once George Wood as his counsel in the case (Rec., p. 49) "*ab initio*." Judgment goes against Barnes as defendant and Walsh as garnishee October 24,

1876, (rec., pp. 41, 42, 43.) The next day, October 25, 1876, the answer of J. D. and C. F. Mayer and Mrs. Polydore is filed and was heard, and the court adjudged that it "was sufficient to bar the plaintiff from recovering against the said garnishees; that they go without day," &c. (Rec., p. 43.) On the next day, October 26, 1876, George Wood, the attorney for Wm. Walsh, but styling himself *amicus curiæ* yet plainly acting in the interest of Wm. Walsh, who declares in his subsequent affidavit he had employed Wood "*all the time*," moves to set aside the judgment on the ground *inter alia* that the defendant Wm. Barnes was dead on May 4, 1875. On October 27, 1876, the judgment was set aside, and the case continued until the next term. Rec., pp. 43, 44.

When George Wood's employment as Walsh's counsel ceased *in fact* does not appear. The only other time that Walsh expressly appeared in the suit was after the final judgment against Barnes's administrator, who had been brought in by *sci. fa.*, and against Wm. Walsh as garnishee again for not answering, October 23, 1877. (Rec., pp. 47, 48.) On October 25, 1877, L. L. Davis, attorney for Walsh, moves to set aside the judgment against Walsh garnishee and file an answer. His affidavit is annexed, and is very noteworthy. The court grants the motion, and the answer is filed the same day. (Rec., pp. 48, 49, 50.) The answer is at once challenged as "not a full and true discovery, and sixty days were allowed plaintiff to controvert it." (Rec., p. 49.) At the May term, 1879, the case was dismissed *by consent*. If not dismissed by consent of Walsh, it is still pending there on the very issue of ownership raised in the present case, with this difference only, here the burden of proof is upon Walsh to prove his ownership; there it was upon the Union Bank. Until this point of ownership is settled and disposed of the question of estoppel, founded upon Walsh's *bona fide* ownership, does not arise. But if your Honors find the ownership in Walsh satisfactorily established, we then urge he cannot now avail himself of it. By leaving the notes in the hands of Wm. Barnes he has bound himself by Barnes's acts and declarations as owner, and thus enabled him to mislead and defraud the defendants to the bill. Walsh, by his long delay in answering as garnishee to the Union Bank, and not answering at all until after final judgment, led the bank to compromise with the Mayers and Mrs. Polydore under the belief that the answers of these latter persons as garnishees were true, and Walsh's silence as garnishee, as long as it lasted, was a continuous admission of indebtedness. Those answers were based on Barnes's representations and acts as owner. Whether Barnes was the actual owner or merely agent for Walsh is immaterial, for in either case his acts bind Walsh. Walsh did away with all the weight to be attached to his notification that he had become the owner of the three notes by permitting them

to remain in the hands of Barnes and without Barnes's indorsement, permitting Barnes afterwards to collect and indorse them as the true owner. After that the Mayers and Mrs. Polydore could not possibly swear they did not owe Barnes. They had no doubt as to the ownership. Having no doubt, they admitted that if they owed anybody anything it was William Barnes.

It is therefore submitted that Walsh, by his acts and conduct, has led the Mayers and Mrs. Polydore to believe that he was the merely colorable owner of the notes, and to make answer as garnishee in the Union Bank case that William Barnes was the true owner. Even if now it be true that Walsh is the *bona fide* owner of the note, he is estopped from urging it against all the defendants. "When one of two innocent persons must suffer he ought to do so who has placed his property in the hands of a careless agent rather than one who acts in good faith and on his confidence in what the agent has done."

"When a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

Swain vs. Seamens, 9 Wall., 254.
O'Brien vs. Weld, 2 Otto, 81.
McCabe vs. Farnesworth, 27 Mich., 52.

Besides, the judgment *in favor* of the garnishees, October 24, 1876, rec, p. 43, and the judgment against William Walsh as garnishee, rec., p. 42, have never been set aside.

III.

The third point on which cross-appellants rely is that the note of $7,500 is barred by the statute of limitations, not only as to J. D. and C. F. Mayer and Mrs. Polydore, but also as to the other cross-appellants, Schmidt & Zeigler, and the Union Bank.

The note, as well as all the interest notes, are dated at New Orleans; and no particular place of payment is specified. William Barnes resided permanently at New Orleans. The note was therefore payable in New Orleans, and was a Louisiana contract. There is not a tittle of proof that any other place was the place of payment than New Orleans. So the lower judge held. But as the question of limitation must be determined by the laws of Mississippi, it being a part of the remedy, we may assume as true the first proposition in the opinion of the court below:

That the note is barred unless the statute "has been waived, or such other action had by defendants to take it out of the statute or estop defendants from setting it up." Rec., p. 124. But we

must controvert the second proposition, "That upon all the facts of this case the action had by and correspondence between the the parties, the bar of the statute of limitation does not attach in this cause, and the complainant is entitled to the relief hereafter stated." This conclusion is based on certain alleged admissions in the correspondence between Walsh and J. D. Mayer & Co., and the execution to Barnes by J. D. Mayer & Co. of certain notes given for the payment of interest, which, although they "might have been avoided in the hands of Barnes, or one holding with a knowledge of their consideration, yet in the hands of a *bona-fide* purchaser, under the law of Louisiana they formed such a consideration as would have stayed Barnes from an enforcement of the collection of the $7,500 note until after the interest note became due and payable, and thereby the prescription was arrested." The learned judge also shows in the clearest way under the Mississippi Code and the decision of its highest court, that to take any case out of the operations of the provisions of this chapter, or to deprive any party of the benefit thereof, "the writing must specify the debt with acknowledgment of its being a legal and subsisting obligation, and one which the obligor intends to pay, express or implied."

This is believed to be the well settled law over the whole Republic. The initiative was taken by this court in 8 Cranch 72, 11 Wheaton, 309, 1 Peters, 351, and

Moore vs. Bank of Columbia, 6 Peters, 92,

and is now universally followed.

In determining the question, we must *first* have a clear, distinct and unequivocal acknowledgment of the debt, and *secondly*, of such a character, *i. e.*, so full and precise, as to enable the court to apply the terms of it exactly as the party intended they should be applied.

The judge below found such acknowledgment in the correspondence which complainant sets out in his bill. Before examining this correspondence, which begins June 30, 1874, we refer to William Barnes's position, as given by *Seal* in answer to third cross-interrogatory, rec., p. 111; which other testimony in the case fully corroborates; and to the legal characteristics of the note for $7,500. This note reads: "We promise to pay"——— "to the order of ourselves," &c., and it is signed by J. D. Mayer, C. F. Mayer and Henrietta Polydore *individually*; it is endorsed by them precisely in the same way. This note is under the general commercial law, and most certainly under Louisiana law a *joint* note, and each drawer responsible for his *virile* share only. Story on notes, §239, 255.

Barrow vs. Norwood, 3 La., (Miller), 437.
Bagget vs. Righter, 4 Rob., (La.,) 18.

A purchase made in joint names is joint; the shape the original transaction takes cannot be changed afterwards.

Smith vs. Watson, 2d Barn & Cr., 401.

Mason vs. Kaine, 17, P. F. Smith, 133, and cases cited.

The note is, therefore, not a partnership note, and real estate cannot be the property in Louisiana of a commercial partnership. Running a hotel is a commercial partnership, but only *the use of the real property* belonging to the individual partners is brought into the firm. Skillman vs. Purnell, 3 La., (Miller), 497, *et passim.* Manifestly, no one of the firm of J. D. Mayer & Co could give a good title to a purchaser of the hotel property; and consequently no member of the firm could renounce an acquired right to plead the statute of limitations. The only acknowledgment, therefore, valid in law and capable of interrupting the running of the statute of limitations must be signed by all three of the drawers and endorsers, individually. This has never been done. If there were nothing else in the case, this would be quite conclusive.

Walsh's first letter, directed to J. D. Mayer & Co., draws the very distinction alluded to between joint notes and partnership notes. "I have become the owner of a note given by *the partners of your firm.*" "I am also the owner of two notes given by *you.*"

The answer is by J. D. Mayer: "Your letter received in reference to your now being *the holder of my notes,*" &c.

This notice addressed to the firm was a nullity as to the joint note. Each party was entitled to a separate notice, for the notice is the *sine qua non* of Walsh's title as to third persons. As to the Union Bank and Schmidt and Ziegler, Walsh's notice to the firm covered only the firm notes. In this case the form is the essence of the affair. Knowledge will not suffice. Third persons, nay the debtors themselves, so long as the form is not complied with, may justly think the transfer unreal, simulated, unworthy of notice or consideration. Thus evidently did J. D. Mayer treat it, as appears from his answer to the alleged notification. He looked on Walsh as a mere *lent name* (*prete-nom.*) Another test of the sufficiency of Walsh's notice may be found in the doctrine of notices of protest to endorsers. The analogy is obvious; and this question is governed by the *lex loci contractus.* Whether the foreign assignment is valid at all, or whether it is valid against the defendant, goes to the merits, and must be decided by the law in which the case has its legal seat. Pritchard vs. Norton, 16 Otto, 130, quoting Wharton; Black vs. Zacherie, 3 How., 483; Golson vs. Powell, 32 La. An., 521.

It is too clear that in these two letters, Exhibits Nos. 1 and 2, pp. 77, 78, there is neither an acknowledgment of a debt nor an intention or willingness to pay. Indeed there is an *implied* de-

nial of *ownership*—most remote from any acknowledgment of plaintiff's *right*, and yet the plaintiff is silent.

Nor do we find anything of that kind in Exhibits 3 and 4, rec., p. 78. Walsh writes again telling the firm he wants "to see some of you in relation to your note of $7,500 of which I am the owner. * * The interest is paid to the first of September last." Walsh knows then that the two small notes have been paid to Barnes. But he neither alleges nor proves that any part of the money came to his hands.

The answer is: "We were served with the enclosed writ some few days ago with instructions, if we paid anything now it was at our own risk until the case was decided," &c. There is neither acknowledgment nor promise to pay here; but a clear intent to abide the controversy; to pay nothing. Every subsequent letter is to be understood as having reference to a state of things in which they would not bind themselves to pay anything to anybody.

From Exhibits 7 and 8, pages 79 and 80, we gather nothing in regard to the limitation. It concerns the fire insurance alone, which the decree withdraws from our examination now.

From Exhibits 9 and 10, p. 80, nothing can be gathered but what refers to the insurance, except that in both the statements of insurance money, Exhibits D and E, in direct violation of Louisiana law, charge interest at ten per cent. *simple* in Ex. E and *compound* in Ex. D. This clear manifestation of flat usury is brushed away in Exhibit F, and the rate reduced to simple six per cent. interest.

From Exhibits 5 and 6, the next in order of date, record, p. 79, the lower judge seems to have derived the acknowledgment and promise to pay. The Ex. 5 is dated New Orleans, March 2, 1876. It is written by Walsh to J. D. Mayer *individually*. After mentioning insurance and the peril to both parties from fire, Walsh writes: "The amount you owe me on the $7,500 note is too large to be left in such an unprotected condition, and I cannot consent to it." The reply on which so much reliance is placed reads: "I think you will run no risk in that time as the property would be worth the amount due you if the building was to burn down." It would be strange if such an expression of a mere opinion could be converted into a clear, distinct, and unequivocal acknowledgment together with a promise, express or implied, to pay. Expectations are not contracts. There was no liquidated debt. "Something *may* be due to you; you do not specify. Do not bother yourself as to insurance to protect you, for after the destruction of the hotel by fire the property would be sufficient to pay you." But taking the whole correspondence together, the position of the writer of J. D. M. & Co.'s letters is as plain as day. "We intend to abide a suit and take our chances,"

and the hypothetical or conditional syllogism: "If the building was to burn down the property would be worth the amount due you" might interest a logician in its solution, but a jurist might conclude that in law it was a denial of *personal* liability altogether, and consequently no promise to pay express or implied. From an implied acknowledgment no promise arises. We cannot get the acknowledgment from an inference and then infer a promise from the inference.

Pollock on Contracts, p. 572.

The lower judge was also of opinion that the notes given by the firm for interest and premiums of insurance would have, under the laws of Louisiana, "stayed Barnes from an enforcement of the collection of the $7,500 note until after the interest note became due and payable, and thereby the prescription was arrested."

There is but one of these notes in the record, page 55, dated New Orleans, May 12; and made payable 4 August, 1874, to the order of William Barnes. In answer to 23d cross-interrogatory, J. D. Mayer says: "$1,125 was for interest on the note, and $262.20 was for the premium for the insurance and interest at 15 per cent. for advancing by Barnes." This answer shows how the two notes for $693.75 each were constituted—$1,125 is 15 per cent. on $7,500, the balance insurance and interest." The small notes were not given to cover the interest ahead, but we frequently did so for Barnes's accommodation." "We commenced to give interest notes in 1869 or 1870, and it was continued until January, 1874." "There was no agreement except that Barnes said he would raise the rate of interest, and we agreed to that."

Even if the creditor has regularly endorsed the receipt of interest at its date, such endorsement alone would not amount to proof of payment, as against the debtor, to avoid the statute.

Are these small notes such acknowledgments of the debt as to take it out of the operation of the statute of limitation? Did these small notes interrupt the running of the statutes? We have seen the acknowledgment must be in writing, and clear, distinct and unequivocal. Hence, "the writing of defendant must identify the debt admitted."

Eckford vs. Evans, 56 Miss. Rep., 18.

Davidson vs. Harrison, 33 Miss. Rep., 41. Reference to notes as "my notes" does not suffice.

Payment endorsed on the note, though signed by the defendant, insufficient.

Davidson vs. Harrison, 33 Miss., 41.

See also Mask & Harrison vs. Philer, 32 Miss., 237.

Lawrence vs. Mangum, 30 Miss., 171.

It results, then, directly from these authorities, that payment of

interest being inadequate to take the case out of the statutes, these small notes, *being mere promises to pay*, can have no higher or stronger force; and therefore cannot ground a waiver of the statutes. For if we go on the promise, it measures our liability; if we look to it as an acknowledgment, it is inferential and implied. We make it out by argument.

The case therefore rests on the attempt (here an experiment), to make a parole agreement, or an alleged parole agreement, serve the purpose of evading the statute of limitations by showing that it was an agreement to extend time, and therefore altered the original contract.

What strikes me at the start is, that what binds Mayer *et al.* was put into writing, but what, it is *now* alleged, bound Barnes, and a very important part of it was not written. In the bill they say *it was written in the interest notes*; but this is denied, and we find in the note produced for 1874—the time most important to have the matter in writing—it was not put there.

There is an old rule that a contract cannot be part in writing and part parole. That no such understanding was reduced to writing is presumptive evidence that it was not made or did not exist.

Taking the bill, it is plain, there was an indefinite promise or understanding which certainly did not bind Barnes nor Mayer *et al.* Both must be bound.

Knox vs. Hunt, 34, Miss., 566.

It must have been such a contract as compelled Mayer *et al.* to pay interest, and denied them the right to pay the principal. The party has attempted to construct here an imaginary case based upon what appears as credits on the note, and, unluckily, in evidence contradicts the bill and these credits. By the bill it is asserted that on receiving the interest, September 1, 1874, there was an extension to September, 1875, of the same kind as the previous ones. Yet it was made, if at all, at Mississippi city, when neither Walsh nor Mrs. Barnes was present, and when Barnes, unless he was then the owner, could not have made it at all.

In September, 1873, there was, says Mrs. Barnes, an agreement to extend the time to September, 1874; so that there was no occasion for any other understanding until September, 1874—there was no understanding then for September, 1875—showing that this annual *renewal* is purely imaginary. There was but one understanding, and that was in 1868, January 2d, and that was an indefinite indulgence so long as Mayer *et al.* would stand the burden of 15 per cent. Of course the interest was payable annually, and these sort of stops occurred. Out of this is constructed the theory of the bill.

The precise point here is that the notes relied on as constituting a binding extension were distinctly given for usurious inter-

est on another note, on an agreement, January 2, 1868, to pay 15 per cent interest. There is no occasion to talk about interest as penalty or liquidated damages. Barnes treated it as interest, and contracted for it as an annual return on the debt. This is interest all over the world.

Judge Harris's argument in the court below.

The doctrine contended for amounts to this, that when the statute requires an acknowledgment in writing it shall not lightly be frittered away by the testimony of witnesses or dubious writings. Here innocent third persons have their interests involved. They have relied on the public records showing that the present claim was prescribed long before they took their mortgage. The plaintiff is clearly in fault. He might have taken a new note or reduced his alleged contract for renewals into writing.

The right of these third parties to plead prescription, as they specially do in their respective answers, is not contested. And it is equally clear that if the note which the mortgage was intended to secure was barred by the statute of limitations at the time either Schmidt & Ziegler or the Union Bank acquired their interest, no subsequent acknowledgment of the debt can affect the vested rights of these creditors.

Larthet vs. Hogan, 1 La. An., 330.

The general legislation of Mississippi in her codes conforms to this view.

IV.

But if Walsh is owner and is not estopped, and his action is not barred by the statute of limitation, it is then urged that the decree appealed from should be affirmed.

There is not the slightest proof in the record that any other place than New Orleans was the place of payment either of the principal note or the notes given after its maturity for 15 per cent. interest. "The law of the place where the contract is made shall govern unless some other place is intended to be the place of performance," and as this is a part of the contract, it must appear in it. Tyler on Usury, 81, 82. The only possible ground on which the pretence that the contract was a Mississippi contract can rest is that the security for the debt was *situated* in Mississippi. The rule is that the security is a mere security for performance, an incident to the contract, and is controlled by the principal contract. If the principal contract is illegal, the security is also. If the principal contract is barred, the security is also. Indeed we never get down to the security until every thing about the principal contract is settled.

In De Wolf vs. Johnson, 10 Wheaton, 367, this question is determined. There the maker of a bond for money lived in Kentucky. The bond was made in Rhode Island. The party to whom it was payable lived there. A mortgage was given on Kentucky lands, and no place of payment made. The court held that the law of Rhode Island governed on the question of usury. The test put was: Suppose the borrower relied on tender, must he come to Rhode Island or must the creditor go to Kentucky to receive the tender? It matters not that foreign security was given, said the court, "where no place of payment is indicated, the place of the contract governs."

Story Confl. § 271 a 272 a. 2d. Kent 460, 1, Note a. The place of the security taken, the *situs* of the land mortgaged, does not affect the rule as to the principal contract, and that the opposing doctrine is absolutely without support, see

1 Jones on Mortgages, 648, 662.
Miller vs. Tiffany, 1 Wall., 298.

The small notes were made in New Orleans. Mrs. Barnes proves this, (rec., p. 76, answer to fourth interrogatory,) and the note exhibited with the answer shows it. These are, therefore, governed by Louisiana law.

By that law the interest note is void, and did not have the effect to create any binding contract to forbear, and the interest on the principal note is forfeited.

Brandt on Suretiship, sections 309, 310, page, 418.
Roberts vs. Stewart, 31 Miss., 664.
Brown vs. Prophet, 53 Miss., 649.

Since 1844, stipulating for more than the legal rate of interest, the whole interest was forfeited, so also by act of 1855. In 1856, a certain class of contracts were exempted from this consequence, and this exemption as to such contracts was made more complete by the act of 1860. These were negotiable notes in which the interest or discount was included in the face and gave to the holder the right to recover the whole.

See Fuqua's Civil Code, La., article 2895, page, 393.
Louisiana Code, 1870, article 2924.

These acts of 1856 and 1860 are so explained as not to exempt notes given with increased interest to procure extension of time.

Crane vs. Beatty, 15 La. Annual, 329.
Campbell vs. Hilliard, 15 Id., 537.

———that a note given for usurious interest on another note is not exempt and explanatory of the acts 1856–60.

Weaver vs. Kearney, 17 La. An., 326.

See also to same effect relating to contracts Tarver vs. Winn, 18 La. An., 557.

The acts of 1856–'60 are confined to notes negotiable, and which stipulate for no interest, but include what there may be of interest or discount in the face of the note capitalized.

The interest notes were nullities, and were never an obstacle to a suit on the principal note; and a further consequence is that the whole interest paid on the note after maturity was illegal and may be recovered back.

The one year's limitation is a statute of limitation of Louisiana, having no effect in Mississippi, and this defence may be made by Schmidt & Ziegler as well as by J. D. Mayer et al. All are brought into the same suit.

McAlister vs. Jerman, 32 Miss., 142.
Edw. J. Dawson vs. Jas. Callaway, 18 Georgia, 573.
Grattan et al. vs. Wiggins et al., 23 California, 16.
Skidmore vs. Romaine, 2 Bradford, N. Y., 122.
1st Jones's Mortgages, § 644.

The Louisiana statutes of 1856 and 1860 suppose a valid consideration for the note in which the interest or discount is included in the face of the note, and usurious interest on another note is held not to be valid, and therefore not within the statute.

The result is that the interest notes on a well established doctrine were not a valid consideration for an extension of time, and did not stay the hand of the creditor.

There are cases where there is a plain design to impose a penalty to constrain payment, such as damages, attorney's fees and other specific sums; but where it is plain parties intend interest, it is interest. The Louisiana law regulates both *ante* and *post* maturity interest. It absolutely prohibits more than eight per cent. on forfeiture of the whole.

It is submitted that we are entitled to have the illegal interest deducted in any event from the face of the note. It is illegal interest, and the Louisiana limitation as to the time to sue for it has no effect here: that is a mere limitaton on the remedy. Walsh has proceeded in a Mississippi court as to remedy and must take Mississippi law as to limitation of time. It was an illegal exaction under the laws of both States, and not the less so because the time of recovery is limited in one State and not in the other.

Respectfully submitted.

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WASHINGTON, D. C., *January* 5, 1884.